Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [11/14/90]

CASE NBR: [89107302] CSY STATUS: [DECIDED]
SHORT TITLE: [Cage, Tommy]
VERSUS [Louisiana] DATE DOCKETED: [041890]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Apr 18 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jul 12 1990		Brief of respondent Louisiana in opposition filed.
4	Jul 19 1990		DISTRIBUTED. September 24, 1990
5	Sep 7 1990	X	Supplemental brief of respondent Louisiana filed.
7	Oct 15 1990		REDISTRIBUTED. October 26, 1990
9	Oct 29 1990		REDISTRIBUTED. November 2, 1990
11	Nov 5 1990		REDISTRIBUTED. November 9, 1990
13	Nov 13 1990		Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam.

****

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

89-7302

IN THE SUPREME COURT
OF THE UNITED STATES

No.

ORIGINAL

TOMMY CAGE
Petitioner

versus

STATE OF LOUISIANA
Respondent

RECEIVED
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SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW Petitioner, by and through his attorney, and requests that the court grant him leave to proceed in forma pauperis, and states in support thereof the following:

1. Petitioner is currently is currently in state penal custody on death row, and is unable to afford the cost of representation in this matter;

2. Petitioner was represented by the Orleans Indigent Defender Program at trial and in his appeal to the Louisiana Supreme Court.

3. Undersigned counsel has assumed representation in this case without compensation.

WHEREFORE Petitioner, through counsel, respectfully requests that he be allowed to proceed in forma pauperis without payment of filing fees or service of notice fees, and for such urther relief as the Court deems just and proper.

Respectfully submitted this 18th day of April, 1990.

Henry D. Gabriel
Attorney for Petitioner
Loyola University Law School
526 Pine Street
New Orleans, LA 70118

SUPREME COURT OF THE UNITED STATES

State of Louisiana)
)
v.).No._____
)
Tommy Cage)

Affidavit in Support of Motion to Proceed on Appeal
in Forma Pauperis

I, Tommy Cage being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   No.

3. Do you own any cash or checking or savings account?

   No.

4. Do you own any real estate, stocks, bond, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   My clothing only.

5. No one is dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Tommy Cage #120587.
Tommy Cage #120587
Affiant
Louisiana State Penitentiary
Death Row
Angola, Louisiana 70712

SUBSCRIBED AND SWORN TO before me this 16th day of April, 1990

Raphael Augustus, CCS II

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

TOMMY CAGE
Petitioner

STATE OF LOUISIANA
Respondent

Petition for a Writ of Certiorari
To the Supreme Court
State of Louisiana

Henry D. Gabriel
Loyola University
School of Law
526 Pine Street
New Orleans, La 70118

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the Louisiana Supreme Court can refuse to consider the effect of the invalidity of a Maynard v. Cartwright, 486 U.S. 356 (1988), aggravating circumstance in a death case, or whether the petitioner's case must be remanded in accordance with this Court's holding in Clemons v. Mississippi, No. 88-6873 (U.S. March 28, 1990).

II. Whether a state court's erroneous definition of reasonable doubt, that it involves a "grave" or "moral" certainty, is a due process violation in a death case.

III. Whether a sentence of death is administered in an unconstitutionally arbitrary and unpredictable fashion if the state references the victim's role as a son and the plight of the victim's family, urges the jury not to feel responsibility for imposing a sentence of death, offers unfounded speculation that the accused would have killed other specific individuals if given a chance, describes the comfortable life the accused will have in prison if not sentenced to death, asks questions which violate state law during the accused's presentation of mitigating evidence, and fails to allow the accused to fully review the juror's findings of aggravating and mitigating circumstances where the trial record shows confusion on this issue.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....1

JURISDICTIONAL GROUNDS.....1

STATUTORY PROVISIONS.....2

STATEMENT OF THE CASE.....5

REASONS FOR GRANTING THE WRIT.....12

I. IN ACCORDANCE WITH THIS COURT'S HOLDING IN CLEMONS V. MISSISSIPPI, No. 88-673 (March 28, 1990), THE PETITIONER'S CASE MUST BE REMANDED TO THE LOUISIANA SUPREME COURT FOR CONSIDERATION OF THE APPROPRIATE PENALTY WITHOUT RELIANCE ON CONSTITUTIONALLY INFIRM AGGRAVATING CIRCUMSTANCES.....12

- A. The Petitioner's Sentence of Death Is Predicated on Invalid Aggravating Circumstances.....12
- B. Because the Louisiana Supreme Court Made No Evaluation of the Effect that Invalid Aggravating Circumstances Have on the Petitioner's Sentence, the Petitioner's Case Must Be Remanded.....14

II. THE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BECAUSE THE LOUISIANA STATE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY REGARDING REASONABLE DOUBT.....16

III. DUE TO THE NUMEROUS CONSTITUTIONAL VIOLATIONS WHICH PLAGUED THE PETITIONER'S TRIAL, HIS SENTENCE OF DEATH IS A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.....18

- A. Due to Victim Impact Evidence, Highlighted By Prosecutorial Misconduct, the Petitioner's Sentence of Death Violates the Eighth and Fourteenth Amendments of the United States Constitution.....20
- B. Prosecutorial Misconduct in the Penalty Phase of the Petitioner's Trial Unconstitutionally Taints His Sentence of Death Because the Misconduct Interjected Irrelevant and Impermissible Factors and Misrepresented to the Jury Their Level of Responsibility.....21
- C. Noncompliance with Louisiana Sentencing Standards Contributed to the Arbitrary Nature of the Petitioner's Sentence Because the Petitioner Is Unable to Fully Review the Jury's Findings Regarding Aggravating and Mitigating Circumstances.....23
- D. Error During the Penalty Phase Eliminated the Persuasive Effect of the Petitioner's Mitigating Evidence.....24

CONCLUSION.....26

CERTIFICATE OF SERVICE.....27

AUTHORITIES

Cases: Pages

Andres v. United States, 333 U.S. 740 (1948).....16

Booth v. Maryland, 482 U.S. 496 (1987).....20,21,23

Brooks v. Kemp, 762 F.2d 1393 (11th Cir. 1985).....23

Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983), cert denied, 469 U.S. 920 (1984).....23

Caldwell v. Mississippi, 472 U.S. 320 (1985).....21

Chapman v. California, 386 U.S. 18 (1967).....17,19

Clemons v. Mississippi, No. 88-6873 (U.S. March 28, 1990).....12,14,15,16,26

Coker v. Georgia, 433 U.S. 584 (1977).....17,19

Dunn v. Perrin, 570 F.2d 21 (1st Cir.), cert denied, 437 U.S. 910 (1978).....18

Eddings v. Oklahoma, 455 U.S. 104 (1982).....19,25,26

Enmund v. Florida, 458 U.S. 782 (1982).....19,20

Francis v. Franklin, 471 U.S. 307 (1985).....16

Furman v. Georgia, 408 U.S. 238 (1972).....14

Gregg v. Georgia, 428 U.S. 153 (1976).....19,23,24

Hance v. Zant, 696 F.2d 940 (11th Cir.), cert. denied, 463 U.S. 1210 (1983).....23

In re Winship, 397 U.S. 358 (1970).....16

Johnson v. Mississippi, 486 U.S. 578 (1988).....18

Lanigan v. Maloney, 853 F.2d 40 (1st Cir. 1988), cert denied, 109 S. Ct. 788 (1989).....18

Lockett v. Ohio, 438 U.S. 586 (1978).....18,25,26

Maynard v. Cartwright, 486 U.S. 356 (1988).....12,13,14,16,26

McCleskey v. Kemp, 481 U.S. 279 (1987).....19

Satterwhite v. Texas, 486 U.S. 249 (1988).....17

State v. Cage, 554 So. 2d 39 (La. 1989).....1,5,7,12,14-17,19,25

State v. Loyd, 489 So. 2d 898 (La. 1986), cert. denied, 481 U.S. 1042 (1987).....13

State v. Sonnier, 402 So. 2d 650, 657 (1981).....23

State v. Stewart, 458 So. 2d 1289 (La. 1984).....13

South Carolina v. Gathers, 109 S. Ct. 2207 (1989).....20,21

United States v. Byrd, 352 F.2d 570 (2d Cir. 1965).....17

United States v. Harrigan, 586 F.2d 860 (1st Cir. 1978).....18

United States v. Oquendo, 490 F.2d 161 (5th Cir. 1974).....18

United States v. Wosepka, 757 F.2d 1006 (9th Cir. 1985), modified, 787 F.2d 1294 (9th Cir. 1985).....18

Zant v. Stephens, 462 U.S. 862 (1983).....15,20

Constitution:

U.S. Const. amend. VIII.....1,2,13,18,20,23,25,26

U.S. Const. amend. XIV, sec. 1.....1,2,13,18,20,23,25,26

Statutes:

La. Rev. Stat. Ann. sec. 14:30 (West Supp. 1990).....5

La. Code Crim. Proc. Ann. art. 905 (West Supp. 1990).....7,15

La. Code Crim. Proc. Ann. art. 905.1 (West Supp. 1990).....2,7

La. Code Crim. Proc. Ann. art. 905.2 (West Supp. 1990).....2,3,7

La. Code Crim. Proc. Ann. art. 905.3 (West Supp. 1990).....3,7

La. Code Crim Pro. Ann. art. 905.4(A)(4) (West Supp. 1990).3,7,13

La. Code Crim. Procedure Ann. art. 905.7 (West Supp. 1990).3,7,23

La. Code Crim. Proc. Ann. art. 905.9 (West Supp. 1990))....4,7,15

La. Sup. Ct. R. 28, sec. 1(b) (West Supp. 1990).....4,15

Miss. Code Ann. sec. 99-19-101(2) (West Supp. 1989).....4,15

Treatises:

Strawn & Buchanan, Jury Confusion: A Threat to Justice, 59 Judicature 478, 481 (1976).....17,24

Forston, Sense and Non-sense: Jury Trial Communication, B.Y.U. L. Rev. 601, 614-15 (1975).....17,24

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

TOMMY CAGE
Petitioner,

STATE OF LOUISIANA
Respondent

Petition for a Writ of Certiorari
To The Supreme Court
State of Louisiana

The Petitioner, Tommy Cage respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Louisiana affirming the judgment of the Criminal District Court of Orleans Parish which sentenced the Petitioner to death in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

CITATIONS OF OPINIONS BELOW

The opinion of the Louisiana Supreme Court appears as Appendix A, and is cited as State v. Cage, 554 So. 2d 39 (1989). The docket sheet setting out the judgment and sentence of the Orleans Parish District Court appears as Appendix B. The Denial of Rehearing by the Supreme Court of Louisiana appears as Appendix C. Relevant pages of the trial transcript appear in Appendix D.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. sec. 2101(d) (1948) and Rule 13.1 of Rules of the Supreme Court of the United States, this petition for a writ of certiorari is filed within 90 days of the denial of the application for rehearing entered by the Supreme Court of the State of Louisiana which was rendered on January 18, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."

U.S. Const. amend. VIII.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

U.S. Const. amend. XIV, sec. 1.

Article 905 of the Louisiana Code of Criminal Procedure provides:

> Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

La. Code Crim. Proc. Ann. art. 905 (West Supp. 1990).

Article 905.1 of the Louisiana Code of Criminal Procedure provides:

> A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same injury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.
> B. If an error occurs only during the sentence hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellate court finds an error that occurred only in the sentencing hearing would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 3 of The Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empaneled.

La. Code Crim. Proc. Ann. art. 905.1 (West Supp. 1990).

Article 905.2 of the Louisiana Code of Criminal Procedure provides:

> The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on

> the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

La. Code Crim. Proc. Ann. art. 905.2 (West Supp. 1990).

Article 905.3 of the Louisiana Code of Criminal Procedure provides:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstances exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstances not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

La. Code Crim. Proc. Ann. art. 905.3 (West Supp. 1990).

Article 905.4(a)(4) of the Louisiana Code of Criminal Procedure provides:

> The following shall be considered aggravating circumstances...
> The offender knowingly created a risk of death or great bodily harm to more than one person.

La. Code Crim. Proc. Ann. art. 905.4(a)(4) (West Supp. 1990).

Article 905.7 of the Louisiana Code of Criminal Procedure provides:

> The form of jury determination shall be as follows:
> "Having found the below listed statutory aggravating circumstances or circumstances and, after consideration of the mitigating circumstances offered, the jury unanimously determines that the defendant should be sentenced to death.
>
> Aggravating circumstance or circumstances found:
>
> s/_____
> Foreman"
>
> or
>
> "The jury unanimously determines that the defendant should be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.
>
> s/_____
> Foreman"

La. Code Crim. Procedure Ann. art. 905.7 (West Supp. 1990).

Article 905.9 of the Louisiana Code of Criminal Procedure provides:

> The Supreme Court of Louisiana shall review every sentence of death to determine if it excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

La. Code Crim. Proc. Ann. art. 905.9 (West Supp. 1990).

Louisiana Supreme Court Rule 28, sec. 1(b) provides:

> Section 1. Review Guidelines. Every sentence of death shall be reviewed by excessive the court shall determine...
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstances....

La. Sup. Ct. R. 28, sec. 1(b) (West Supp. 1990).

Mississippi Code Section 99-19-101(2) provides:

> Whether sufficient factors exist as enumerated in subsection (7) of this section;
> Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;
> Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and
> Based on these conditions, whether the defendant should be sentenced to life imprisonment or death.

Miss. Code Ann. sec. 99-19-101(2) (West Supp. 1989).

Louisiana Revised Statute section 14:30 provides:

> A. First degree murder is the killing of a human being:
> (1) When the offender has specific intent to kill or inflict great bodily harm and is engaged in the perpetration of...armed robbery....

La. Rev. Stat. Ann. sec. 14:30 (West Supp. 1990).

Louisiana Code of Criminal Procedure article 557 provides:

> A court shall note receive an unqualified plea of guilty in a capital case. If a defendant makes such a plea, the court shall order a plea of not guilty entered for him.

La. Code. Crim. Proc. Ann. art. 557 (West Supp. 1990).

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The Petitioner, Tommy Cage, is a death row inmate at the Louisiana State Penitentiary in Angola, Louisiana. On May 15, 1986 Cage was indicted for first degree murder in violation of La. Rev. Stat. Ann. sec. 14:30 (West Supp. 1990). Article 557 of the Louisiana Code of Criminal Procedure requires that the defendant in a capital case enter a plea of not guilty. La. Code Crim. Pro. Ann. art. 557 (West Supp. 1990). Accordingly, Cage entered a plea of not guilty on May 19, 1986. Hearings were held on the petitioner's motions on June 20th and June 26th 1986. He was convicted after a two day jury trial beginning on January 22, 1987 in the Criminal District Court of Orleans Parish, Louisiana. A sentencing hearing was conducted before the same jury. The jury recommended that a sentence of death be imposed, and based upon this recommendation, the trial judge sentenced the petitioner to death on August 28, 1987. Appendix B.

The Petitioner filed for direct review with the Louisiana Supreme Court raising six assignments of error.[13] The Court found no merit in any of the claims, and on December 11, 1989, the Court affirmed the petitioner's conviction and sentence. State v. Cage, 554 So. 2d 39 (La. 1989). Appendix A. The Petitioner's

---

[13] The Assignment of Errors raised were:

1. The trial court erred in improperly instructing the jury regarding reasonable doubt.

2. The verdict in the penalty phase does not comply with the statutory requirements.

3. The trial court erred in allowing improper impeachment of character evidence during the penalty phase.

4. The trial court erred in twice denying motions for mistrial during the argument of the state during the penalty phase.

5. If the jury found the aggravating circumstance that the offense was committed in an especially heinous, atrocious, or cruel manner, the state failed to present sufficient evidence to support this aggravating circumstance.

6. If the jury found the aggravating circumstance that the offender knowingly created a risk of death or great bodily harm to more than one person, the state failed to present sufficient evidence to support this aggravating circumstance.

application for rehearing was denied by the Louisiana Supreme Court on January 18, 1990. Id. Appendix C.

STATEMENT OF THE FACTS

On April 16, 1986 Arthur Johnson and Terry Kendrick were waiting at a bus stop in New Orleans, Louisiana. Both wore medallions on gold chains. Kendrick testified that he noticed the Petitioner and a companion walk past them and look at their medallions. Appendix D, Tr. 245. Kendrick became suspicious and told Johnson to put his medallion inside his shirt as he had done. Appendix D, Tr. 245. The bus pulled up and Kendrick went to board it. He testified that as he did so, he was knocked down by the Petitioner who had pulled out a gun. Appendix D, Tr. 246-48. Johnson saw the gun and began to run. Kendrick testified that the Petitioner chased after Johnson. The pair ran out of Kendrick's vision. He heard two shots about five seconds apart, although he did not see the shots fired. Appendix D, Tr. at 250. He later saw the Petitioner run into a nearby housing project. Appendix D, Tr. 251.

Lloyd Turner, the bus driver, testified that he saw the struggle and saw the Petitioner with a gun in his hand. Appendix D, Tr. 210. Turner and three other eye witnesses testified that the Petitioner stopped, took aim and shot Johnson. The shot was fired from approximately seventy-five feet. Appendix D, Tr. 273. These three witnesses, Reginald Lewis, Tony Jones, and Romales Nevelles all testified that the Petitioner then ran up to Johnson, grabbed the chain , and shot him again. Lewis, who was closest, testified that there were no words exchanged between Johnson and Cage. Appendix D, Tr. 228. Jones, who was farthest away, claimed he heard the victim beg not to be shot again, and that the Petitioner responded that he told him not to run. Appendix D, Tr. 273-74. Nevelles did not hear anything the victim said, but claimed he heard the Petitioner tell Johnson that he told him not to run before Cage shot Johnson. Appendix D, Tr. 293. All of the witnesses said that the Petitioner then ran

into the housing project. All of the witnesses testified that they later picked out the Petitioner from a physical or photographic line-up.

Paramedics found Johnson at the scene with no pulse, respiration, or blood pressure. He was later pronounced dead at New Orleans's Charity Hospital. The autopsy revealed that Johnson had been shot twice, once in the lower back and once in the head. The evidence indicated that the shot to the head was made from approximately two feet from the victim. Appendix A, 554 So. 2d at 40-41.

On April, 17, 1986, pursuant to an arrest warrant, police went to Tommy Cage's home, but he was not there. Shortly, thereafter, the police received a call from a family member telling them that the Petitioner was home and would be waiting for them.

The Petitioner admitted to firing the gun, but that he did not intend to hit the victim with the first shot, and did not believe he had done so. He testified that, the second time, the gun "just went off". Appendix D, Tr. 349-50.

Cage admitted that he had been smoking "clickums" (marijuana cigarettes laced with phencycladine) on the day of the incident. A medical doctor testified that clickums cause irritability, paranoia, and violent behavior. A person using clickums does not have a conscious memory, and will attack when easily frightened. Appendix D, Tr. 410-11.

The Petitioner was tried in accordance with the provisions of La. Code Crim. Pro. Ann. art. 905-905.9, which provide for a bifurcated trial in capital cases. During the guilt phase of the trial, the judge instructed the jury "that the doubt 'must be such...as would give rise to a grave uncertainty' and that '[i]t is a doubt which a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.'" State v. Cage, 554 So. 2d 39, 41 (La. 1989).

The Petitioner objected[2] to the court's charge concerning the definition of reasonable doubt as setting a standard higher than that required by the law.[3]

During the State's closing argument in the guilt phase, the State discussed the victim's role as a son, began to describe to the jury what the victim's family deserved, and informed the jury, after defense counsel's objections, that "they don't want me to talk about the family." Appendix D, Tr. 435-36. The State also said, in regard to the victim, that the petitioner "gave him a cord all right." Id. The court denied the defendant's motion for a new trial.[4] The jury returned a verdict of guilty as

---

[2] Trial Transcript at 426:

[The Court] Do you wish to note some objections to the charge I am going to give the jurors?

[Defense Counsel] Yes, your honor.... The first one being to that which you call the general charge. The last paragraph beginning with, "It must be such a doubt as would give a grave uncertainty raised in your minds." I object to that on the basis of it raises reasonable doubt to a higher standard or a lower standard than contemplated by the law.

[The Court] Your objection is noted.

[3] The court charged the jury as follows:

Ladies and Gentlemen, the Defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt.... If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainly. If after giving a fair and impartial consideration to all the facts in the case you find the evidence unsatisfactory or lacking of one any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. (Emphasis added.) (Trial transcript at 441-42.)

[4] (Trial Transcript at 435-36):

[The State] "Let me tell you another thing. Had this victim, Arthur Johnson, Jr. been the son of somebody.."

charged.

During the penalty phase of the trial, the defense presented the petitioner's sister who testified, among several topics, to the petitioner's lack of violent tendencies.[5] During

---

[Defense Counsel] Your honor, that's outside --- that's inflammatory, and I would move for a mistrial.

[Court] Motion for mistrial denied.

[Defense Counsel] Admonish the jury.

[Court] I will sustain the objection. The jury is to disregard that comment.

[State] That family there deserves--

[Defense Counsel] That's outside the evidence also. That family has been grieved. There is no need to go into that, your Honor.

[Court] Mr. McMahon, you will have to confine your argument to the evidence presented from the witness stand.

(Trial Transcript at 438-40):

[State] Of course, they don't want me to talk about the family--

[Defense Counsel] Your Honor, he's doing it anyhow. I have asked for a mistrial. You have admonished him. What is he going to do? Keep abusing the system?

[Court] The objection is sustained. Motion for a mistrial is denied. Ladies and Gentlemen, again, you are to disregard the comments made about the family. Mr. McMahon, please confine your argument to the law and evidence and the reasonable conclusion which can be drawn from it.

[State] Abusing the system? He's in court. He had the protection of the United States Constitution, the Louisiana Constitution given to every criminal defendant.

[Defense Counsel] That is outside of the evidence likewise.

[Court] I will sustain that. Don't comment on the objections.

[State] What can he give Arthur Johnson, Jr.? He gave him a cord all right.

[Defense Counsel] Judge, he's doing it. This is a sequential argument following Mr. Merrit's objection.

[Court] Do not comment on the objection. Do not comment on his argument or statements during any objection, Mr. McMahon.

[5] Trial transcript at 499-504.

the state's cross-examination of the witness, the following exchange took place:

> [State] Now you say your son--your brother, has never done anything violent before this, correct?
>
> [Witness] Yes.
>
> [State] And would your opinion of him change if I told you that on September 27, 1985, he was arrested at 3400 Laussat Street for possession of a concealed weapon? Would that change your opinion?
>
> [Witness] No, it wouldn't.
>
> [State] Would it change your opinion of him if I told you he was arrested at 3559 Florida Avenue for resisting arrest and assault--
>
> [Defense Counsel] Objection, and I would move for a mistrial.
>
> [Court] Motion is denied.
>
> [State] Would it change your opinion of him if I told you he was arrested at 3559 Florida Avenue?

Appendix D, Tr. at 505. Defense counsel objected on the grounds of immateriality; after a bench conference, the court sustained this objection, admonished the jury, and denied defense counsel's request for mistrial on these grounds. Appendix D, Tr. 505-6.

During the closing argument of the penalty phase, the state made a series of prejudicial statements which resulted in further defense counsel objections and requests for a mistrial. Although the court denied the petitioner's six motions for mistrial, the court did sustain four objections to the state's argument. Appendix D, Tr. 533-546. Specifically, the state made improper comments about the defense counsel's demeanor, suggesting that he was manipulating the jury, Appendix D, Tr. 533-35. The state also explained that the petitioner would have killed others had he been given the opportunity: "[W]e could have three murder victims instead of one." Appendix D, Tr. 537. The prosecution also stated that the jury would not be responsible for condemning the petitioner to death if they imposed the death sentence:

> You're not going to put anybody to death. Not you. We have a law. We have laws. We have laws enacted by the legislature. People that we vote for. We have Justices of the Supreme Court of the United States....You are not in a unique position. You are not the only jurors in the world who have had to consider this. Other juries have come back.

Appendix D, Tr. 539-40. The state also asked the jury to make a decision based on inflammatory emotions: In response to defense counsel's objection that the prosecutions arguments were inflammatory, the prosecution said: "Go back to April 16th. That should inflame you....That should inflame any well-thinking person." Appendix D, Tr. 537.

In addition, defense counsel objected to the State's description of how comfortable the petitioner's life in prison would be if he is not sentenced to death: "Life in Angola means life goes on. Where will he be ten years from now? Where will he be? Riding in the prison rodeo, playing softball, working in the fields, watching cable TV? And [the victim] is--" Appendix D, Tr. 560. The court also sustained defense counsel objections on the grounds that the state was making personal commentaries regarding defense counsel, and on the grounds that the state was making assertions beyond the evidence on the subjects of petitioner's prior convictions. Appendix D., Tr. 561, 568. Defense counsel also objected to the state's inflammatory and irrelevant characterization of the victim, and alleged victims of other crimes. Appendix D, Tr. 572-3, 575-6.

The jury returned three times with a verdict, but each time it was not in the proper form required under Louisiana Law, and pursuant to Article 813 of the Louisiana Code of Criminal Procedure, the court sent the jury back to the jury room to put the verdict in proper form. Appendix D, Tr. 587-90, 590. Instead of sending the jury back for a fourth time, however, the trial judge, in open court, directed the jury foreman on how to fill out the verdict form. Appendix D, Tr. 591[6]. The defense counsel

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[6] Trial Transcript at 591:

> [Court] As to Subpart C on the form of the verdict, the word under aggravating circumstances, the offender has been previously convicted of an armed robbery. The word

objected. Appendix D, Tr. 596. The jury returned a death sentence verdict.

Throughout the entire course of the petitioner's trial, forty-two of defense counsel's objections were found to be valid and were accordingly sustained.[7]

REASONS FOR GRANTING THE WRIT

I. IN ACCORDANCE WITH THIS COURT'S HOLDING IN CLEMONS V. MISSISSIPPI, No. 88-6873 (March 28, 1990), THE PETITIONER'S CASE MUST BE REMANDED TO THE LOUISIANA SUPREME COURT FOR CONSIDERATION OF THE APPROPRIATE PENALTY WITHOUT RELIANCE ON CONSTITUTIONALLY INFIRM AGGRAVATING CIRCUMSTANCES

Two of the four aggravating circumstances found by the jury in the penalty phase of the petitioner's trial are improper; one is unconstitutional under this Court's holding in Maynard v. Cartwright, 486 U.S. 356 (1988), and the other is contrary to Louisiana law. Because the Louisiana Supreme Court refused to consider the effect that two invalid aggravating circumstances have on the appropriateness of the petitioner's death sentence, Clemons v. Mississippi, No. 88-6873 (U.S. March 28, 1990), requires that the state court's decision be vacated, and the petitioner's sentence be remanded for examination of the constitutionally permissible aggravating circumstances only.

A. The Petitioner's Sentence of Death Is Predicated on Invalid Aggravating Circumstances

The inclusion of an "especially heinous, atrocious or cruel" aggravating circumstance in the jury instruction in the penalty

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"unrelated" is left out as I have it in Subpart C under aggravated circumstance. I am going to instruct the Foreman of the jury is this is his verdict-- if this is the unanimous verdict of the jury please place the word "unrelated" between the word "and" and "armed robbery".

(FOREMAN OF THE JURY COMPLIES.)

[Court] Under Subpart G under aggravating circumstances in which the jury recommended that the offense was committed in an especially heinous, atrocious or cruel manner, if that is the recommendation of the jury, please place the word "atrocious" after the word "heinous".

[7] Appendix D, Tr. 20, 25, 33, 35, 37, 38, 125, 128, 168, 206, 209, 226, 234, 235, 240, 241, 271, 278, 356, 368, 373, 375, 376, 434-5, 436, 439, 440, 462, 469, 470, 491, 511, 534, 535, 543, 544, 561, 568.

phase, see State v. Cage, 554 So. 2d 39, 45 (La. 1989), is a violation of the Eighth and Fourteenth Amendments of the United States Constitution. The Louisiana statute, as applied in the petitioner's case, is unconstitutionally vague. In Maynard v. Cartwright, 486 U.S. 356 (1988), this Court addressed identical language in an Oklahoma statute. The language "especially heinous, atrocious, or cruel" is unconstitutionally vague, held this Court, as there is "no principled means provided to distinguish those that received the penalty from those that did not." Id., 486 U.S. at 360. In a prior consideration of this language, the Louisiana Supreme Court recognized the potential for unconstitutional vagueness, and upheld the imposition of death based on this aggravating circumstance where "[t]his phrase was properly explained to the jury." State v. Loyd, 489 So. 2d 898, 902 (La. 1986). However, in the petitioner's case, no guidance was given to the jury beyond a mere recitation of the circumstance itself. (Tr. 578). In addition, the reviewing court in the petitioner's case did not attempt to narrow the aggravating circumstance definition to require "torture or serious physical abuse," Maynard v. Cartwright, 486 U.S. at 365; see State v. Cage at 45-46 (not addressing the validity of this aggravating circumstance). Accordingly, the State's use of the "especially heinous, atrocious, or cruel" aggravating circumstance is identical to the sentencing procedure held unconstitutional in Maynard v. Cartwright, supra. Therefore, this aggravating circumstance is constitutionally invalid.

Further, a second aggravating circumstance, that the petitioner "knowingly created a risk of death or great bodily harm to more than one person," La. Code Crim Pro. art. 905.4(A)(4), was impermissibly applied to the petitioner. Based on Louisiana's traditional definition of this aggravating circumstance, the petitioner has a legitimate claim that it cannot apply to him. See State v. Stewart, 458 So. 2d 1289, 1291-92 (La. 1984) (interpreting the now repealed La. Rev. Stat. Ann. sec. 14:30(3)); State v. Cage at 40-41 (only one victim was

hurt or shot at). The Louisiana Supreme Court did not broaden this definition to include the petitioner's case; the court did not make any consideration of this circumstance. See State v. Cage at 45-46. Further, the petitioner has a legitimate claim that if the circumstance does apply to him, this application is unconstitutional. If the interpretation of this circumstance is broadened to include the petitioner, the provision would then fail to "adequately...inform juries what they must find to impose the death penalty and as a result leav[e] them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia," 408 U.S. 238 (1972). Maynard v. Cartwright, 486 U.S. at 362. Accordingly, two of the four aggravating circumstances relied upon by the jury in sentencing the petitioner to death are impermissible.

B. Because the Louisiana Supreme Court Made No Evaluation of the Effect that Invalid Aggravating Circumstances Have on the Petitioner's Sentence, the Petitioner's Case Must be Remanded.

Because unconstitutional aggravating circumstances were relied upon in the State's imposition of the petitioner's death sentence, and because the Louisiana Supreme Court did not consider the effect of the invalidity of these circumstances, the petitioner's case must be remanded in light of this Court's holding in Clemons v. Mississippi, No. 88-6873 (U.S. March 28, 1990). In Clemons, the "especially heinous, atrocious, and cruel" circumstance held invalid in Maynard v. Cartwright, supra, was one of two circumstances supporting Clemons' death sentence. The "Mississippi Supreme Court did not actually reweigh the evidence...and instead simply held that when an aggravating circumstance relied on by the jury has been invalidated, the sentence may be affirmed as long as there remains at least one valid and undisturbed aggravating circumstance[.]" Clemons, No. 88-6873 (U.S. March 28, 1990). This Court held that although the state supreme court had the power to uphold the penalty after reweighing the sentence or making a determination of harmless error, because this had not been done, the decision of the Mississippi Supreme Court need be vacated. Id. The Clemons Court

reasoned: "What is important...is an **individualized** determination on the basis of the character of the individual and the circumstances of the crime." Clemons, supra (quoting Zant v. Stephens, 462 U.S. 862, 879 (1983)) (emphasis in original).

The Clemons holding is directly applicable to the petitioner's case. The Louisiana Supreme Court made no attempt to reweigh the aggravating and mitigating evidence, nor did the court make a harmless error review. See State v. Cage, 554 So. 2d 39, 46 (La. 1989). The court summarily reasoned: "Where one aggravating circumstance is upheld on review, the failure of another aggravating circumstance would not invalidate a death penalty." Id. (citation omitted). Not only did the court fail to reweigh the evidence or conduct a harmless error review, as required under Clemons, but the court made no consideration at all of the effect of the unconstitutional aggravating circumstances on the petitioner's death sentence. Cage, supra.

The Louisiana Supreme Court's failure to even consider the effect of the constitutionally infirm circumstances is analogous to the Mississippi Supreme Court's failure to reweigh the circumstances in accordance with Mississippi statutory procedure. See Clemons ("We find the opinion below unclear"), supra; Miss. Code Ann. sec. 99-19-101 (Supp. 1989). Even if the Louisiana Supreme Court was not required to "reweigh" in accordance with state statutes, see La. Code Crim. Proc. Ann. art. 905 (West Supp. 1990), the Louisiana statutory scheme required appellate review of "whether the evidence supports the jury's finding of a statutory aggravating circumstance" in determining whether a death sentence is excessive. La. Sup. Ct. R. 28, sec. 1(b) (applicable to La. Code Crim. Proc. Ann. art. 905.9 (West Supp. 1990)). Although the Louisiana Supreme Court considered the petitioner's mitigating circumstances in the court's proportionality review, 554 So. 2d at 46-47, the aggravating circumstances at issue here were not reviewed.

The "individualized determination" required under Zant v. Stephens, supra, and interpreted under Clemons, supra, was

unconstitutionally omitted from Louisiana's consideration of the petitioner's sentence of death, as no determination was made regarding the effect of the constitutionally infirm aggravating circumstances. Accordingly, as in Clemons, the petitioner's state decision must be vacated, and his case must be remanded for a review of his sentence in accordance with Clemons and Maynard v. Cartwright.

II. THE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BECAUSE THE LOUISIANA STATE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY REGARDING REASONABLE DOUBT

This Court's decision in In re Winship, 397 U.S. 358, 364 (1969), demonstrates that errors in the definition of reasonable doubt are of constitutional magnitude. The right to proof beyond a reasonable doubt is indispensable in a criminal trial. Id. The petitioner was deprived of this fundamental right because the trial judge improperly defined reasonable doubt in the petitioner's state criminal trial: included in the judge's jury instruction was the explanation that "doubt 'must be such...as would give rise to a grave uncertainty' and that '[i]t is a doubt which a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.'" State v. Cage, 554 So. 2d at 41.

This definition of reasonable doubt is constitutionally invalid. In interpreting the meaning of a jury charge, a court must determine "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307, 316 (1985). First, the specific language is examined. Second, the meaning of the instruction as a whole is interpreted. See id. at 315-25. In death cases, doubt as to the meaning reasonable men might derive from a jury instruction should be resolved in favor of the accused. Andres v. United States, 333 U.S. 740, 752 (1948).

Although the Louisiana Supreme Court agreed that the language could have overstated the requisite degree of certainty, thereby confusing the jury, the court found that the meaning of the charge taken as a whole cured the infirmities in the specific

language. State v. Cage, 554 So. 2d at 41. However, where the punishment is irrevocable, the possibility of jury confusion regarding the State's burden of proof is unconstitutional. This possibility contributes to an unacceptable likelihood of "the purposeless and needless imposition of pain and suffering," Coker v. Georgia, 433 U.S. 584, 592 (1977). In addition, this Court has promulgated specific guidelines regarding the application of the harmless error standard to death cases: "The question...is not whether the legally admitted evidence was sufficient to support the death sentence,..but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Satterwhite v. Texas, 486 U.S. 249, 258-59 (1988) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). There is no demonstration beyond a reasonable doubt that the jury was not misled by the charge; the Louisiana Supreme Court's summarily concluded that the charge as a whole was sufficient. See State v. Cage at 41. Accordingly, the Louisiana Supreme Court's disregard for the petitioner's fundamental right to proof beyond a reasonable doubt is inapposite to the safeguards afforded accuseds who are faced with the sentence of death.

Furthermore, clinical studies illustrate the difficulty that jurors have in understanding the reasonable doubt standard of proof. See Strawn & Buchanan, Jury Confusion: A Threat to Justice, 59 Judicature 478, 481 (1976); Forston, Sense and Nonsense: Jury Trial Communication, B.Y.U. L. Rev. 601, 614-15 (1975). In light of this evidence, the State Court inappropriately dismissed the infirmities in the instructions at issue. There is no reason to find that the words "grave" and "moral" did not stand out in the minds of the jurors. The court's summary conclusion that the jury understood does not meet the standards of Satterwhite or Chapman.

Federal judiciaries have generally recognized that analogous reasonable doubt definitions are in error, and that this error is a due process violation. In United States v. Byrd, 352 F.2d 570,

575 (2d Cir. 1965), the United States Court of Appeals for the Second Circuit held that the definition of reasonable doubt as "a doubt to a moral certainty" is improper. Likewise, the United States Court of Appeals for the First Circuit held a conviction invalid on the grounds that there was a distinct possibility that the jury was misled. Dunn v. Perrin, 570 F.2d 21, 25 (1st Cir. 1978). In United States v. Harrigan, 586 F.2d 860, 863 (1st Cir. 1978), this First Circuit also found that correct instructions did not erase error in erroneous instructions which "came at the outset of the charges and formed an integral part of the instructions." See also Lanigan v. Maloney, 853 F.2d 40, 48 (1st Cir. 1988) (concluding that "the entire thrust of the reasonable doubt charge was to de-emphasize the strength of what is supposed to be a very strong standard"). In addition, the United States Court of Appeals for the Ninth Circuit found a constitutional violation in an instruction that "reasonable doubt 'is a doubt based on reason and common sense.'" United States v. Wosepka, 757 F.2d 1006, 1099 (9th Cir. 1985). See also United States v. Oquendo, 490 F.2d 161, 165 (5th Cir. 1974).

III. DUE TO THE NUMEROUS CONSTITUTIONAL VIOLATIONS WHICH PLAGUED THE PETITIONER'S TRIAL, HIS SENTENCE OF DEATH IS A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978). The reliability required to ascertain the appropriateness of a sentence of death was not attained in the petitioner's state proceedings, due to a variety of constitutional infirmities.

The requirement of special reliability for imposition of the death sentence is commanded by the "fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment." Johnson v. Mississippi, 486 U.S. 578, 584 (1988). The imposition of death violates the Eighth and Fourteenth Amendments of the United States Constitution unless two separate requisites are met. First, the statutory scheme for

determination of death for an accused must prevent this penalty from being administered in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153 (1976). To accomplish this, the "[s]tate must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances" of a particular defendant's case meets the "required threshold below which the death penalty cannot be imposed." McCleskey v. Kemp, 481 U.S. 279, 305 (1987). This standard is not met in the petitioner's case because victim impact evidence was introduced, because prosecutorial misconduct alleviated the jury's appreciation of their responsibility in sentencing the petitioner to death, and because inadequacies in the record prevent the petitioner from reviewing the jury findings.

The second requisite for imposition of the death penalty is that the defendant has an absolute right to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense. Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). Error during the petitioner's presentation of mitigating evidence contributed to the due process violations in his trial.

The death sentence requisites insure that the death penalty serves two purposes: retribution and deterrence. Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting Gregg v. Georgia, supra, 428 U.S. at 183). "Unless the death penalty...measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund, 458 U.S. at 798 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

Due to constitutional infirmities in the petitioner's trial, the punishment of death in his case is the "purposeless and needless imposition of pain and suffering." Coker v. Georgia, 433 U.S. at 592. The Supreme Court of Louisiana concluded that the numerous errors in the petitioner's trial were harmless. State v. Cage, 544 So. 2d 39 (La. 1989). However, the State did

not prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained[,]" Chapman, 386 U.S. at 24, when these errors are viewed in their totality.

A. Due to Victim Impact Evidence, Highlighted By Prosecutorial Misconduct, the Petitioner's Sentence of Death Violates the Eighth and Fourteenth Amendments of the United States Constitution

This Court forbids victim impact evidence in the penalty phase of a death sentencing procedure. Booth v. Maryland, 482 U.S. 496, 502 (1987). This safeguard is necessary to avoid "the risk that a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'" Id. (quoting Zant v. Stephens, 462 U.S. 862, 885 (1983)). Because victim impact statements do not relate to the circumstances of the crime or the moral culpability of the accused, these comments render the penalty phase constitutionally infirm. South Carolina v. Gathers, 109 S. Ct. 2207, 2210-11 (1989). "Our capital cases have consistently recognized that '[f]or purposes of imposing the death penalty...[the defendant's] punishment must be tailored to his personal responsibility and moral guilt. " South Carolina v. Gathers, 109 S. Ct. 2207, 2210 (1989) (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

Specifically prohibited are "descriptions of the victims' personal characteristics, statements concerning the emotional impact of the crime on the victims' family, and the family members' opinions about the crime and the defendant." Id. (citing Booth v. Maryland, 482 U.S. 496 (1987)). During the State's closing argument in the guilt phase, the State discussed the victim's role as a son, began to describe to the jury what the victim's family deserved, and informed the jury, after defense counsel's objections, that "they don't want me to talk about the family." Appendix D, Tr. 435-36. The State also said, in regard to the victim, that the petitioner "gave him a cord all right." Further, the state referred to the victim, and to the alleged victims of other crimes in an inflammatory and inappropriate manner. Appendix D, Tr. 572-3, 575-6. These comments encompass all of the categories of invalidly prejudicial

statements articulated by this Court in Booth, and reinforced in Gathers. In South Carolina v. Gathers, 109 S. Ct. at 2210, statements in the first category alone constituted a due process violation. Accordingly, consistent with this Court's holdings, the prejudicial statements made in the petitioner's state criminal trial render his sentence of death unconstitutional, as the irrelevant and inflammatory statements were likely to result in arbitrary punishment.

B. Prosecutorial Misconduct in the Penalty Phase of the Petitioner's Trial Unconstitutionally Taints His Sentence of Death Because the Misconduct Interjected Irrelevant and Impermissible Factors and Misrepresented To the Jury Their Level of Responsibility

For two independent reasons, prosecutorial misconduct in the penalty phase tainted the petitioner's sentence of death. First, the prosecutor's comments decreased the jury's sense of responsibility. See Caldwell v. Mississippi, 422 U.S. 320 (1985). Second, the prosecutor injected irrelevant, prejudicial concerns into the penalty phase; the unconstitutionality of this method of eliciting a death sentence is illustrated in South Carolina v. Gathers, 109 S. Ct. 2207 (1989), and other decisions of this Court.

In the penalty phase of the petitioner's trial, the prosecutor's comments misled the jury into devaluing their responsibility in returning a sentence of death; these comments were unconstitutional. "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985). During the petitioner's trial, the prosecution suggested to the jury that the responsibility for making this determination did not lie with them. Specifically, the prosecution said, "You are not in a unique position....Other juries have come back--" Appendix D, Tr. 540. In addition, the state assured the jury that "[y]ou're not going to put anybody to death. Not you." Id. These deceptive assurances are impermissible.

Also impermissible are repeated instances of prosecutorial misconduct, designed to inject irrelevant and prejudicial factors into the jury's decisionmaking process. The trial court sustained six objections to prosecutorial statements in the penalty phase alone. Appendix D, Tr. 533-46, 561, 568. The state made improper comments about the defense counsel's demeanor, suggesting that he was manipulating the jury, Appendix D, Tr. 533-35. The state also explained that the petitioner would have killed others had he been given the opportunity: "[W]e could have three murder victims instead of one." Appendix D, Tr. at 537. In addition, the state literally asked the jury to make a decision based on inflammatory emotions: in response to defense counsel's objection that the prosecutions arguments were inflammatory, the prosecution said: "Go back to April 16th. That should inflame you....That should inflame any well-thinking person." Appendix D, Tr. 537.

In addition, the state embarked on an inaccurate, irrelevant, and prejudicial description of how comfortable the petitioner would be if not given the death sentence: "Life in Angola means life goes on. Where will he be ten years from now? Where will he be? Riding in the prison rodeo, playing softball, working in the fields, watching cable TV? And [the victim] is--" Appendix D, Tr. 560. Furthermore, the court sustained defense counsel objections on the grounds that the state was making personal commentaries regarding defense counsel, and on the grounds that the state was making assertions beyond the evidence on the subjects of petitioner's prior convictions. Appendix D., Tr. 561, 568. The forty-two defense counsel objections sustained by the trial court evidence the extent of prosecutorial misconduct in this case.[20] The barrage of inaccurate and inflammatory statements, engineered to focus the juror's thoughts on immaterial issues, are impermissible, as this sentencing

[20] Appendix D, Tr. 20, 25, 33, 35, 37, 38, 125, 128, 168, 206, 209, 226, 234, 235, 240, 241, 271, 278, 356, 368, 373, 375, 376, 434-5, 436, 439, 440, 462, 469, 470, 491, 511, 534, 535, 543, 544, 561, 568.

process does not serve the permissible goals of retribution and deterrence, but could instead "result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." Booth v. Maryland, 482 U.S. at 505.

Persuasive precedent supports the petitioner's interpretation of the permissible limits of prosecutorial error. See Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (error in prosecutor's comments not harmless as "[t]he improper remarks were made at an important stage of the trial and were extensive."); Brooks v. Kemp, 762 F.2d 1393, 1410 (11th Cir. 1985) (The implication that another authority has made the death decision renders the penalty phase constitutionally invalid); Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983) (Finding references to defendant's association with other in prison and appeal to jurors' passions to constitute error of constitutional dimension).

In conclusion, viewed in their totality, the numerous prejudicial errors in the petitioner's trial rise to the level of a due process violation. "With a man's life at stake, a prosecutor should not play on the passions of the jury." Hance v. Zant, at 951.

C. Noncompliance with Louisiana Sentencing Standards Contributed to the Arbitrary Nature of the Petitioner's Sentence Because the Petitioner Is Unable to Fully Review the Jury's Findings Regarding Aggravating and Mitigating Circumstances

The omission of the jury form from the trial record is a constitutional violation because the petitioner is denied the ability to determine if the verdict adhered to the strict provisions of the Eighth and Fourteenth Amendments of the United States Constitution. See e.g., Gregg v. Georgia, 428 U.S. 153 (1976). Louisiana law instructs that the written ballot form be entered into the trial record and made available to the petitioner for review. See La. Code Crim. Proc. Ann. art. 905.7, 920 (West Supp. 1990); State v. Sonnier, 402 So. 2d 650, 657 (1981). The petitioner's inability to examine the ballot form to

determine whether the standards of death penalty provisions have been conformed to contributes to the arbitrary nature of his death sentence.

Jury confusion hindered the petitioner's opportunity to a fair trial. Transcripts of the petitioner's trial reveal that inconsistencies between the written ballot form and the verdict rendered caused the jurors to deliberate three times before reaching a verdict which confo med to the legal standard. Appendix D, Tr. 587-90, 590. Additionally, the trial judge impermissibly assisted jurors in answering the ballot form correctly. See Appendix D, Tr. 591, 596. Contrary to Louisiana law requiring that the signed ballot form be included in the trial record, the petitioner's certificate is missing. Given the recorded evidence of considerable jury confusion in this case, the petitioner has an interest in reviewing the jury's list of aggravating and mitigating circumstances.

Not only does the evidence specific to this case reveal the likelihood of jury confusion, but research indicates that, as a general rule, juries do not understand instructions. In one study, 86% of the criminal jurors examined did not understand what constitutes proof of guilt, and 85% showed some confusion regarding what constitutes evi..nce. Forston, Sense and Non-sense: Jury Trial Communication, B.Y.U. L. Rev. 601, 614-15 (1975). See also Strawn & Buchanan, Jury Confusion: A Threat to Justice, 59 Judicature 478, 481 (1976).

In conclusion, the record of the petitioner's trial reveals substantial jury confusion regarding the verdict form list of aggravating and mitigating circumstances. Because the constitutionality of the petitioner's death sentence is contingent on these findings, see e.g. Gregg v. Georgia, supra, the omission of this form from the record contributes to the fundamental unfairness and arbitrary nature of his trial and death sentence.

D. Error During the Penalty Phase Eliminated the Persuasive Effect of the Petitioner's Mitigating Evidence

Error during the petitioner's presentation of mitigating evidence is not harmless, in light of this Court's emphasis on the significance of mitigating evidence. As mitigating evidence, the petitioner presented his sister as a character witness. The court sustained an objection to the prosecution's cross examination of this witness. Appendix D, Tr. 505-06. The prosecution asked this witness: "[W]ould your opinion of [the petitioner] change if I told you that...he was arrested...for possession of a concealed weapon? Would that change your opinion?"; "Would it change your opinion of him if I told you he was arrested...for resisting arrest and assault--"; and "Would it change your opinion of him if I told you he was arrested...." Id. The Louisiana Supreme Court found that the prosecution "improperly sought the witness's opinion of" the petitioner. State v. Cage, 554 So. 2d at 43. However, the court also found that the petitioner was not prejudiced. Id. On the contrary, prejudice to the petitioner exists, as this impermissible line of questions was engineered to keep the jury from fully considering the weight of the petitioner's mitigating evidence.

This Court has unrelentlessly protected an accused's right to present mitigating evidence is necessary to prohibit the wanton and freakish imposition of the death sentence. The Court has struggled to provide "standards for the constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused." Eddings v. Oklahoma, 455 U.S. at 111. Pursuant to these standards, each sentencing court must respect the uniqueness of the individual so that the factors which may call for less severe penalties will be considered. When such factors are not presented, the sentencing is "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v. Ohio, 438 U.S. at 606. The Eighth and Fourteenth Amendments require that the sentencer will "not be precluded from considering as a mitigating factor any aspect of a defendant's character or record of any of the circumstances of the offense that the defendant proffers as a

basis for a sentence less than death." Id., 438 U.S. at 604. Consideration of all the mitigating evidence retards the risk that the imposition of the death sentence will be made "out of whim, passion, prejudice or mistake." Eddings v. Oklahoma, 455 U.S. at 117 (O'Connor, J., concurring). "When the choice is between life and death, such risk is unacceptable[.]" Lockett v. Ohio, 438 U.S. at 606. In conclusion, the error at issue should be considered in light of the other violations of state and federal law which occurred during both the guilt and penalty phase of the petitioner's trial. Viewed in their totality, these errors are not harmless.

CONCLUSION

This Court's holding in Clemons v. Mississippi, No. 88-6873 (U.S. March 28, 1990), is directly applicable. In the petitioner's case, as in Clemons, an aggravating circumstance in violation of Maynard v. Cartwright, 486 U.S. 356 (1988), was relied upon to impose a sentence of death, and the invalidity of this circumstance was not considered on review. Accordingly, the petitioner's case must, at the least, but remanded to the Louisiana Supreme Court for consideration of his sentence in light of Maynard v. Cartwright.

In addition, due to the extensive admission of irrelevant and inflammatory facts in the penalty phase of the petitioner's trial, including victim impact statements and comments engineered to diminish the jurors' sense of responsibility, the petitioner's death sentence violates the Eighth and Fourteenth Amendments. Accordingly, the petitioner's case should be remanded for resentencing.

The petitioner also asks this Court to grant an entirely new trial, as his trial was rendered fundamentally unfair by error in the state trial court's definition of reasonable doubt in the guilt phase of his capital punishment proceeding.

Respectfully Submitted,

Henry D. Gabriel

CERTIFICATE OF SERVICE

I, Henry D. Gabriel, do hereby certify that two true and correct copies of the forgoing petition for Writ of Certiorari have been served by placing the same in the United States mail, certified, return receipt requested, on this the 18th day of April, 1990, upon:

Honorable Harry F. Connick
District Attorney
Jack Peebles
Assistant District Attorney
619 South White Street
New Orleans, Louisiana 70119

Respectfully Submitted,

Henry D. Gabriel

Loyola Law School
7214 St. Charles Ave.
New Orleans, LA 70118

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

TOMMY CAGE
Petitioner

STATE OF LOUISIANA
Respondent

Appendices Accompanying
Petition for a Writ of Certiorari
To the Supreme Court
State of Louisiana

Henry D. Gabriel
Loyola University
School of Law
526 Pine Street
New Orleans, La 70118

Counsel for Petitioner

APPENDICES

Appendix A- OPINION OF THE LOUISIANA SUPREME COURT IN THIS CASE, STATE V. CAGE, 554 So.2d 39, (La. 1989).

Appendix B- DOCKET SHEET SHOWING THE JUDGMENT AND SENTENCE OF THE ORLEANS PARISH CRIMINAL COURT

Appendix C- DENIAL OF APPLICATION FRO REHEARING BY THE LOUISIANA SUPREME COURT

Appendix D- SELECTED PAGES FROM THE TRIAL TRANSCRIPT

APPENDIX A- OPINION OF THE LOUISIANA SUPREME COURT
STATE V. CAGE, 554 So.2d 39 (La. 1989).

STATE of Louisiana

v.

Tommy CAGE.

No. 87-KA-2778.

Supreme Court of Louisiana.

Dec. 11, 1989.

Rehearing Denied Jan. 18, 1990.

Defendant was convicted of first-degree murder and sentenced to death in the Criminal District Court, Parish of Orleans, Leon Cannizzaro, J., and he appealed. The Supreme Court, Marcus, J., held that: (1) jury instructions regarding reasonable doubt when read as a whole were not improper; (2) prosecutor's improper question seeking witness' opinion of defendant rather than his character based on general reputation did not prejudice defendant; (3) State's improper remarks during penalty phase did not influence, prejudice or divert jurors from sentencing obligations when State's closing argument and rebuttal were considered as a whole; and (4) death sentence was not disproportionate to crime and to penalty imposed in similar cases.

Affirmed.

Dennis, J., concurred in part and dissented in part with reasons and would grant a rehearing.

1. Criminal Law ⇐822(16)

Allegedly misleading jury instructions regarding reasonable doubt, referring to doubt giving rise to a "grave certainty" and necessary for jurors to have a "moral certainty," when taken in context as a whole, would be properly understood by reasonable persons of ordinary intelligence.

2. Criminal Law ⇐1169.1(3)

Challenges to trial court's written jury verdict in penalty phase for prosecutorial misconduct in stating [illegible] in case in which verdict read by judge was contained in record and conformed directly to language specified in statute governing verdict form in penalty phase, particularly since defendant was present when verdict was read and did not object to its form. LSA-C.Cr.P. art. 905.7.

3. Criminal Law ⇐1169.5(2)

Defendant was not prejudiced by State's questions which improperly sought witness' opinion of defendant, rather than his character based on general reputation, where defendant had failed to object to first question and defendant's objection to second question was sustained and followed by admonishment to jury. LSA-C.Cr.P. art. 905.7; LSA-R.S. 15:479 (Repealed).

4. Criminal Law ⇐723(1)

Although references to defense techniques might be improper in general, prosecutor's remark referring to defense evidence of defendant's childhood, family life and discovery of religion since he was jailed as designed to take the jurors away from the murder, remark was valid reference to evidence introduced.

5. Criminal Law ⇐720(9)

Prosecutorial comment suggesting that three people could have been murdered rather than one was proper argument based on evidence admitted, including testimony of two robbery victims who identified defendant as their assailant, one of whom saw defendant with a gun and the other felt what she thought was a gun.

6. Criminal Law ⇐1171.1(3)

Considering State's closing argument and rebuttal as a whole, improper remarks including references to prior jury verdicts, living conditions at state penitentiary and other statements, did not influence, prejudice, or divert jurors from their sentencing obligations, which judge correctly set forth in his charge to them after argument, and did not contribute to verdict or to jury's [illegible]

7. Homicide ⇐342

Where armed robbery aggravating circumstance was upheld on review of capital first-degree murder conviction, failure of other aggravating circumstances did not invalidate death penalty absent any indica-

tion that unproven circumstances injected arbitrary factor into proceedings.

8. Homicide ⇐357(5)

Death penalty imposed on 19-year-old defendant who shot victim twice, once as he was fleeing and the second time at close range when unresisting victim was immobilized, was not disproportionate to penalty in similar cases; defendant had three prior adult convictions including one for armed robbery committed just five days before murder and one for robbery committed day before murder, and evidence was contradictory as to whether defendant was intoxicated at time of the offense. Sup.Ct.Rules, Rule 28, § 4(b), 8 LSA-R.S.

William J. Guste, Jr., Atty. Gen., Harry F. Connick, Dist. Atty., Jack Peebles, Asst. Dist. Atty., for appellee.

Sherry Waters, Craig Colwart, New Orleans, for appellant.

MARCUS, Justice.

Tommy Cage was indicted by the grand jury for the first degree murder of Arthur Johnson in violation of La. R.S. 14:30. After trial by jury, defendant was found guilty as charged. A sentencing hearing was conducted before the same jury that determined the issue of guilt. The jury unanimously recommended that a sentence of death be imposed on defendant. The trial judge sentenced defendant to death in accordance with the recommendation of the jury. On appeal, defendant relies on six assignments of error for the reversal of his conviction and sentence.[1]

FACTS

On April 16, 1986 at about 11:30 a.m., Arthur Johnson and Terry Kendrick were waiting at a bus stop on the corner of Desire Street and Florida Avenue in New Orleans. They were returning home from their morning classes at Southern University of New Orleans. Both wore medallions on gold chains. Kendrick testified that he noticed defendant and a companion walk past them and look at their medallions. He became suspicious and told Johnson to put his medallion inside his shirt as he had done. The bus pulled up and Kendrick went to board it. As he did so, defendant knocked him from behind onto the steps. While struggling over the medallion, defendant pulled a .38 caliber gun. The struggle continued until defendant was able to jerk the chain off Kendrick. Lloyd Turner, the bus driver, testified that he saw the struggle and saw defendant with a gun in his hand. When defendant pulled the gun, Johnson ran away from the bus. After getting Kendrick's chain, defendant chased after Johnson waving his gun. Turner and three other eyewitnesses testified that defendant stopped, took aim, and shot Johnson hitting him in the lower back. The shot was fired from approximately seventy-five feet. The impact of the bullet knocked Johnson forward and he fell to the ground. Defendant ran up to Johnson, stopped, and aimed the gun at him. Reginald Lewis, a bystander at the bus stop, testified that Johnson appeared to be paralyzed. Tony Jones, who was also waiting at the bus stop, testified that he heard Johnson beg not to be shot again. Romales Nevelles, Sr., a political campaigner in the neighborhood, testified that defendant said to Johnson, "Bitch, I told you don't run." Jones heard defendant make a similar comment to Johnson. Defendant then shot Johnson in the head, took the medallion, and ran into the Florida Housing Project. Paramedics found Johnson at the scene with no pulse, respiration, or blood pressure. He was pronounced dead a short time later at Charity Hospital.

The autopsy revealed that Johnson had been shot twice, once in the lower back at the end of the spine and once on the right side of the head just behind the hairline. Dr. Paul McGarry, the forensic pathologist who performed the autopsy, recovered both bullets from the body. He testified that the wound to the back would cause immediate immobility, but that Johnson would have survived with prompt treatment. The wound to the head proved fatal. Dr. McGarry stated that a stiplo mark, or gunpowder burn, found near the head wound indicated that the muzzle of the gun was approximately two feet from Johnson's head when the shot was fired. This was corroborated by eyewitness testimony. On April 17, pursuant to an arrest warrant, police went to defendant's home, but he was not there. Shortly after, police received a phone call from a family member that defendant had returned home and would be there waiting for them. Kendrick, Lewis, Nevelles, and Jones identified defendant from photographic lineups. Turner identified defendant at a police lineup. All of these witnesses made positive in-court identifications of defendant. Defendant admits firing the gun, but testified that he fired the first shot "just to be shooting" and that, the second time, the gun "just went off again."

ASSIGNMENT OF ERROR NO. 1

Defendant contends that the trial judge erred in improperly instructing the jury regarding reasonable doubt. He argues that the instruction confused the jury and overstated the requisite degree of uncertainty. Specifically, defendant assigns error to the judge's instruction that the doubt "must be such ... as would give rise to a grave uncertainty" and that "[i]t is a doubt which a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty."

La.Code Crim.P. art. 804(A) provides that the court may define "reasonable doubt" in its charge to the jury. The test articulated by this court is whether, taking the instructions as a whole, reasonable persons of ordinary intelligence would understand the definition of "reasonable doubt." *State v. Taylor*, 410 So.2d 224 (La.1982). *See also State v. Stumetto*, 382 So.2d 935 (La.1980).

[1] Defendant's objection to the trial judge's instructions on reasonable doubt was overruled. The trial judge charged the jury as follows:

> Ladies and Gentlemen, the Defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt.... If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*. If after giving a fair and impartial consideration to all the facts in the case you find the evidence unsatisfactory or lacking of one any single point indispensibly necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. (Emphasis added.)

The use of "grave uncertainty" and "moral certainty," if taken out of context, might overstate the requisite degree of uncertainty and confuse the jury. However, taking the charge as a whole, we find that reasonable persons of ordinary intelligence would understand the definition of "reasonable doubt." Similar instructions have been upheld by this court. *State v. Messiah*, 538 So.2d 175 (La.1988); *Taylor*, *supra*. Accordingly, we find Assignment of Error No. 1 to be without merit.

ASSIGNMENT OF ERROR NO. 2

[2] Defendant contends that because the written verdict of the jury in the penalty phase was missing from the record, he

1. The first assigned error relates to the guilt phase; the remaining five relate to the penalty phase. Defendant briefed only the first three assigned errors and addressed the fourth in his Capital Sentence Review Memorandum. However, as a matter of policy, this court will consider all assigned errors even if not briefed. *State v. Bay*, 529 So.2d 845 (La.1988).

was unable to review it to insure that it met statutory requirements.

At the conclusion of deliberations, the jury returned to the courtroom and the foreman delivered the verdict to the judge. The judge reviewed the ballot slips finding that the jury was unanimous in its recommendation that defendant be sentenced to death and read the verdict in open court. However, the judge would not receive the verdict because it did not comply with his instructions. The jurors had identified each aggravating circumstance by letter rather than writing them out word for word. The judge directed the jury to return to the jury room to correct the verdict form. When the jurors returned to the courtroom, the judge noted that they still had not written out the exact wording of the aggravating circumstances. The jury left the courtroom again. When the jurors returned, the judge pointed out that they had omitted "unrelated" from one aggravating circumstance and "atrocious" from another. The jury foreman corrected this in open court and the judge accepted the verdict. The judge again reviewed the ballot slips noting that the recommendation was unanimous and again read the verdict into the record. The defendant rejected the court's offer to poll the jurors individually. The court then read the verdict to the jurors for a third time and asked them to indicate "Yes" if they agreed with it and "No" if they disagreed. After the verdict was read, all jurors answered affirmatively. He then ordered that the verdict be recorded.

At the time of defendant's trial, La.Code Crim.P. art. 905.7 prescribed the following verdict form in the penalty phase:

> The form of the jury recommendation shall be as follows:
>
> "Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury unanimously recommends that the defendant should be sentenced to death.
>
> Aggravating circumstance or circumstances found:
>
> s/_____
>
> Foreman"
>
> ....

This court has held that an omission from the record is not cause for reversal if that omission is inconsequential to a proper determination of the appeal. *State v. Ford*, 338 So.2d 107 (La.1976). The test is whether the omission is immaterial to adequate appellate review. *State v. Johnson*, 438 So.2d 1091 (La.1983); *State v. Vaughn*, 378 So.2d 905 (La.1979).

In the instant case, the verdict read by the judge[2] is contained in the record and conforms exactly to the language specified in La.Code Crim.P. art. 905.7. Moreover, defendant was present when the verdict was read and did not object to its form. A review of the record affords this court adequate appellate review of the verdict. Accordingly, the omission of the written form from the record is inconsequential to a proper determination of the appeal.

Assignment of Error No. 2 is without merit.

ASSIGNMENT OF ERROR NO. 3

Defendant contends that the trial judge erred in allowing improper impeachment of character evidence during the penalty phase.

Defendant called his sister who testified to his non-violent nature. On cross-examination, the prosecutor asked if her opinion of defendant would change if he told her that defendant had been arrested for possession of a concealed weapon in 1985. She answered in the negative. He then [illegible]

2. The trial judge read in open court:
> Having found the below listed statutory aggravating circumstance or circumstances, and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death. Aggravating circumstance or circumstances found: A, the offender was engaged in the perpetration or attempted perpetration of armed robbery, [illegible] the offender has been previously convicted of an unrelated armed robbery, D, the offender knowingly created a risk of death or great bodily harm to more than one person, G, the offense was committed in an especially heinous, atrocious, or cruel manner. Signed Thaddeus Pouchet, Foreperson, January 24, 1987, New Orleans, Louisiana.

asked if her opinion would change if he told her that defendant had been arrested for resisting arrest and assault. At this point, defendant objected and moved for a mistrial. The trial judge sustained the objection, but denied the motion. Furthermore, the trial judge admonished the jury to disregard the prosecutor's comments.

La.Code Crim.P. art. 905.2 provides that:

> The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue.

At the time of defendant's trial, La.R.S. 15:479 provided that "character" depends on general reputation, not on a particular person's opinion of defendant. *State v. Toomer*, 395 So.2d 1320 (La.1981).

[3] The questions were not phrased in accord with La.R.S. 15:479. The state improperly sought the witness's opinion of defendant rather than his character based on general reputation. However, only two improper questions were asked. When the witness was asked the first question about defendant's arrest for possession of a concealed weapon, defendant did not object. After the second question was asked concerning defendant's arrest for resisting arrest and assault, defendant's objection was sustained and the judge admonished the jury. Moreover, at the beginning of the penalty phase, all the testimony and exhibits of the guilt phase, which included defendant's admission to three prior convictions, were introduced into evidence.[3] Both sides stipulated that defendant was the same person named in the bills of information for those convictions. The victims of the two prior robberies testified before defendant's sister testified. Under the circumstances, we find that defendant was not prejudiced by the state's questions.

Assignment of Error No. 3 is without merit.

3. Defendant was convicted of carrying a concealed weapon on February 2, 1984, armed robbery on April 10, 1984, and first degree robbery on April 15, 1984.

SENTENCE REVIEW

Article 1, section 20 of the Louisiana Constitution prohibits cruel, excessive, or unusual punishment. La.Code Crim.P. art. 905.9 dictates that this court shall review every sentence of death to determine if it is excessive. The criteria for review are established in La.Sup.Ct.R. 28, § 1:

> Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(a) PASSION, PREJUDICE OR ANY OTHER ARBITRARY FACTORS ASSIGNMENT OF ERROR NO. 4

Defendant contends that the trial judge erred in denying his motions for mistrial during the state's closing argument and rebuttal. He argues that the state created a substantial risk that the death sentence was imposed in an arbitrary, capricious, or unfair manner by injecting totally irrelevant factors into the proceedings.

Defendant objected and moved for a mistrial when the state said during closing argument, "The evidence presented was to take your mind off of the reality of [A]pril 16th." The objection was sustained and the motion denied. Defendant objected and moved for a mistrial when the state, discussing defendant's previous robbery convictions, said, "Based upon his character and his propensities, easily we could have had three murder victims instead of one." The objection and motion were denied. De-

fendant also objected and moved for a mistrial during the following colloquy:

> BY [THE STATE]: ... You are not in a unique position. You are not the only jurors in the world who have had to consider this. Other juries have come back—
>
> BY [DEFENDANT]: That's outside of the evidence, Your Honor.
>
> BY THE COURT: I would sustain that as to what other juries might have done.
>
> CLOSING ARGUMENT BY [THE STATE]: They don't want you to hear this.
>
> BY [DEFENDANT]: I object.
>
> BY [DEFENDANT]: Mistrial, Your Honor. This is actually prosecutorial misconduct, and nothing less.
>
> BY THE COURT: The motion for a mistrial is denied.
>
> BY [DEFENDANT]: Note our objection, please.
>
> BY THE COURT: Ladies and Gentlemen, you are to disregard that last comment by the prosecutor. That is out of order, Mr. [Prosecutor]. Proceed.

Defendant's motion for a mistrial at the conclusion of the state's closing argument based on the totality of the state's conduct was denied. During rebuttal, defendant objected and moved for a mistrial when the state suggested that the jury in defendant's armed robbery conviction had deliberated for only ten minutes. The objection was sustained and the motion denied. Defendant also objected when the state referred to living conditions at Louisiana State Penitentiary during its rebuttal argument. The objection was overruled.

La.Code Crim.P. art. 774 provides that "[t]he argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." This court has held that improper closing argument is not reversible error unless the court determines that the jurors were influenced by the remarks and that the remarks contributed to the verdict. *State v. Kyles*, 513 So.2d 265 (La.1987), *cert. denied*, — U.S. —, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988); *State v. Lindsey*, 428 So.2d 420 (La.), *cert. denied*, 464 U.S. 908, 104 S.Ct. 261, 78 L.Ed.2d 246 (1983). In *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), the United States Supreme Court held that the *Chapman* harmless error rule applies during the penalty phase of a capital case to the erroneous admission of psychiatric testimony in violation of the sixth amendment right set forth in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).[4] Recently, this court applied the harmless error rule to the erroneous and improper arguments of the state, during the penalty phase, which presented to the jury inadmissible unsworn testimony to facts outside the record, not subject to cross-examination. *State v. Smith*, No. 87-KA-0649, — So.2d — (La. Oct. 23, 1989). The harmless error rule provides that, "[b]efore a reviewing court may declare the erroneous admission of evidence to have been harmless, or not prejudicial, the state must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Smith, supra; Satterwhite, supra; Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[4, 5] The first remark complained of occurred when the state said that the evidence which defendant had presented was designed to take the jurors away from April 16, 1986 (the date of the murder). Defendant had introduced evidence of his childhood, family life, and discovery of religion since he was jailed in an apparent effort to take the jurors' attention away from the offense. While, in general, references to defense techniques might not be proper, this was a valid remark referring to the evidence introduced. The second comment was made when the state suggested

4. In *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), the Court recognized that defendants formally charged with capital crimes have a sixth amendment right to consult with counsel before submitting to psychiatric examinations designed to determine their future dangerousness.

that three people could have been murdered rather than one. The state introduced testimony of the two robbery victims who identified defendant as their assailant. One saw defendant with a gun and the other felt what she thought was a gun. Moreover, the circumstances and location of those two robberies were similar to the instant case in which the victim was murdered. Hence, the state's comment was a proper argument based on the evidence admitted.

[6] Next, when the state said that the jury was not in "a unique position.... Other juries have come back—," defendant's objection was sustained. At that point, the state remarked, "They don't want you to hear this." Defendant's motion for a mistrial was denied, but the court admonished the jury to disregard the comment. The state's comment was improper; however, it simply referred to an unconcluded statement as to what other juries might have done. During rebuttal, the state suggested that the jury in defendant's armed robbery conviction deliberated only ten minutes. Defendant's objection was sustained. The state's comment was improper but of no consequence. The state's reference to life at Louisiana State Penitentiary was also improper; however, the state was attempting to answer defendant's argument that life imprisonment would be sufficient punishment.

The state's argument consisted of twelve pages and sixteen pages in rebuttal (objections, argument, and rulings included). The state reminded the jury that defendant had already been found guilty of first degree murder, but that the state still carried the burden of proof in the penalty phase. The state further told the jury that it was the jury's duty to return the correct verdict based on defendant's character and propensities. "You worked within the system, a legal system, a lawful system. You do the right thing.... [I]t's not going to be easy. But the just thing is not always the easiest thing to do." The state reviewed evidence to show that defendant had a significant prior history of criminal activity. During rebuttal, the state reviewed the evidence to refute the mitigating factors advanced by defendant, to emphasize defendant's prior criminal activity, and to note that defendant admitted that his crime was terrible. Accordingly, considering the state's closing argument and rebuttal as a whole, we conclude that the state's improper remarks did not influence, prejudice, or divert the jurors from their sentencing obligations, which the trial judge correctly set forth in his charge to them after argument, and did not contribute to the verdict. Moreover, the state proved beyond a reasonable doubt that the remarks complained of did not contribute to the jury's recommendation that defendant be sentenced to death.

Assignment of Error No. 4 is without merit.

(b) STATUTORY AGGRAVATING CIRCUMSTANCES ASSIGNMENTS OF ERROR NOS. 5 AND 6

Defendant contends that the state failed to present sufficient evidence to support the aggravating circumstance that the offense was committed in an especially heinous, atrocious, or cruel manner and that the offender knowingly created a risk of death or great bodily harm to more than one person.

The jury in its verdict found the following aggravating circumstances:

> (a) the offender was engaged in the perpetration or attempted perpetration of armed robbery (La.Code Crim.P. art. 905.4(A)(1));
>
> (b) the offender has been previously convicted of an unrelated armed robbery (La.Code Crim.P. art. 905.4(A)(3));
>
> (c) the offender knowingly created a risk of death or great bodily harm to more than one person (La.Code Crim.P. art. 905.4(A)(4)); and
>
> (d) the offense was committed in an especially heinous, atrocious, or cruel manner (La.Code Crim.P. art. 905.4(A)(7)).

Armed robbery is the taking of anything of value from the person or custody of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon. La.R.S. 14:64.

[7] In the instant case, the evidence amply supports the jury's finding that defendant was engaged in the perpetration of an armed robbery. Four eyewitnesses testified that they saw defendant take Johnson's chain and medallion while armed with a gun. Moreover, defendant admitted that, while armed, he "snatched" the medallion off of Johnson.[5] Because the jury's finding of one statutory aggravating circumstance is supported by the record, we find it unnecessary to determine whether the jury erred in its finding of the complained of aggravating circumstances. Where one aggravating circumstance is upheld on review, the failure of another aggravating circumstance would not invalidate a death penalty. *State v. Thompson*, 516 So.2d 349 (La.1987), *cert. denied*, — U.S. —, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). This is true so long as the evidence of the possibly unproven circumstances did not inject an arbitrary factor into the proceedings. *State v. Tassin*, 536 So.2d 402 (La.1988), *cert. denied*, — U.S. —, 110 S.Ct. 205, 107 L.Ed.2d 159 (1989). No such evidence was introduced in this case.

Assignments of Error Nos. 5 and 6 are without merit.

(c) PROPORTIONATELY TO THE PENALTY IMPOSED IN SIMILAR CASES

Federal constitutional law does not require a proportionality review. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Nonetheless, La.Sup.Ct.R. 28, § 4(b) provides that the district attorney shall file with this court a list of each first degree murder case tried after January 1, 1976 in the district in which sentence was imposed. Including the instant case, the state's list reveals that 178 first degree murder cases were tried in Orleans Parish between January 1, 1976 and June 20, 1988. Our research reveals that Orleans Parish juries have recommended the death penalty in twenty-four cases since January 1, 1976. Fourteen of those cases involved murders committed during the perpetration or attempted perpetration of an armed robbery.[6]

Our inspection of these cases shows that the penalty in the instant case is not disproportionate. For example, in *State v. Kyles*, *supra*, the 25-year-old defendant attacked a female shopper in a parking lot demanding her car keys. When she fought back, he shot her once in the temple. The defendant's felony arrests and pending felony charges as an adult were not made known to the jurors. In *State v. Messiah*, *supra*, the 25-year-old defendant approached a group of people in the parking lot of a fast food restaurant. He drew a gun and demanded money. When the victim responded that she had none, defendant killed her with one shot to the face. He had prior convictions for two non-violent felonies, one non-violent misdemeanor, and two municipal convictions. In *State v. Thompson*, *supra*, the 22-year-old defendant approached the victim as he was parking his car and pushed him to the ground. The victim offered his wallet and watch; nonetheless, defendant shot him five times. Defendant had an extensive juvenile record and adult convictions for possession of weapons, possession of marijuana, and attempted armed robbery.

[8] In the instant case, the 19-year-old defendant shot the victim twice, once as he was fleeing and a second time at close range when he was immobilized. The victim offered no resistance. Defendant has three prior adult convictions. In an effort to counteract the aggravating circumstances argued by the state, defendant argued three mitigating circumstances:

(1) his lack of significant criminal history prior to the crime (La.Code Crim.P. art. 905.5(a));

(2) his inability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law due to intoxication at the time of the crime (La.Code Crim.P. art. 905.5(e));

(3) his youth (nineteen years at the time of the crime) (La.Code Crim.P. art. 905.5(f)).

Defendant admitted to three prior convictions, one for armed robbery committed just five days before Johnson's murder and one for first degree robbery committed the day before Johnson's murder. Regarding intoxication, defendant testified that he has smoked clickums[7] on an irregular basis since he was sixteen and that he smoked clickums on the morning of the crime. However, his testimony on direct was inconsistent varying from smoking none to smoking two on the morning of April 16, 1986. Furthermore, defendant's claim that he did not remember the events of April 16 after, and because of, smoking clickums was refuted by his own testimony. In addition, no objective evidence was introduced to show drug use by defendant. However, defendant did call a general practitioner who talked with him for a short time at court prior to testifying about the effects of clickums. The doctor also stated that it is impossible to tell if a person is chemically dependent based on just one personal interview. Lastly, defendant's age was a mitigating circumstance for the jury to consider. Accordingly, based on similar cases and our review of the record in the instant case, we are unable to conclude that the sentence of death is disproportionate to the penalty imposed in similar cases in Orleans Parish.

Hence, based on the above criteria, defendant's sentence of death does not constitute cruel, excessive, or unusual punishment.

DECREE

For the reasons assigned, defendant's conviction and sentence are affirmed for all purposes except that this judgment shall not serve as a condition precedent to execution as provided by La.R.S. 15:567 until (a) defendant fails to timely petition the United States Supreme Court for certiorari; (b) that Court denies his petition for certiorari; (c) having filed for and been denied certiorari, defendant fails to petition the United States Supreme Court timely, under their prevailing rules, for rehearing of denial of certiorari; or (d) that Court denies his application for rehearing.

DENNIS, J., concurs in part and dissents in part with reasons.

5. The evidence also supports the jury's finding that defendant was previously convicted of an unrelated armed robbery. The victim of the armed robbery testified about the crime; moreover, defendant admitted his prior conviction.

6. *State v. Parker*, 372 So.2d 1037 (La.1979), *cert. denied*, 460 U.S. 1044, 103 S.Ct. 1443, 75 L.Ed.2d 799 (1983); *State v. Jordan*, 420 So.2d 420 (La.1982) (rem'd for resentencing); *State v. Marshall*, 414 So.2d 684 (La.), *cert. denied*, 459 U.S. 1048, 103 S.Ct. 468, 74 L.Ed.2d 617 (1982); *State v. Brown*, 414 So.2d 689 (La.1982) (rem'd for resentencing); *State v. Matthews*, 407 So.2d 1150 (La.1982), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); *State v. James*, 431 So.2d 399 (La.), *cert. denied*, 464 U.S. 908, 104 S.Ct. 263, 78 L.Ed.2d 247 (1983); *State v. Hamilton*, 478 So.2d 123 (La.1985), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986); *State v. Kyles*, 513 So.2d 265 (La.1987), *cert. denied*, — U.S. —, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988); *State v. Brown*, 514 So.2d 99 (La.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988); *State v. Thompson*, 516 So.2d 349 (La.1987), *cert. denied*, — U.S. —, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988); *State v. Messiah*, 538 So.2d 175 (La.1988); *State v. John Sullivan*, 526 So.2d 816 (La.1988); *State v. Smith*, No. 87-KA-0649, — So.2d — (La. Oct. 23, 1989) (rem'd for new trial); *State v. Tommy Cage*, 554 So.2d 39 (La. 1989).

7. "Clickums" are typically marijuana cigarettes dipped in or sprayed with PCP (or phencycli-

SOUTHERN MESSAGE SERVICE, INC., Appellee,

v.

LOUISIANA PUBLIC SERVICE COMMISSION and Cameron Telephone Company, Appellants.

No. 89-CA-2121.

Supreme Court of Louisiana.

Dec. 11, 1989.

Public Service Commission and land line telephone company appealed from decline.

APPENDIX B- DOCKET SHEET SHOWING THE JUDGMENT AND SENTENCE OF THE ORLEANS PARISH CRIMINAL COURT

DOCKET MASTER

ORLEANS PARISH CRIMINAL DISTRICT COURT

STATE OF LOUISIANA
vs.
TOMMY CAGE

VIOLATION(S):
R.S 14:30
FIRST DEGREE MURDER

CASE NO. 313-962
SECTION: "J"
CLASS: 1st

APPEAL APPEAL

DATE	PROCEEDINGS
5/15/86	Filed True Bill DOB 2/12/66, FP# N/A
5/16/86	Allotted, Set for Arraignment 5/19/86 2/12/66
5/19/86	The Defendant appeared for Arraignment, the Court appointed OIDP to represent the Defendant for Arraignment only. Defendant entered a plea of Not Guilty. Set for Motion to Determine Counsel 5/27/86.
5/27/86	The Defendant was present for Motion to Determine Counsel, the Court appointed Numa Bertel, Esq. of the OIDP to represent the defendant. Set for Hearing on Motion 6/20/86.
6/20/86	Defendant Cage present with counsel. Matter recessed until 6/27/86. State filed answers to Motion for Discovery and Inspection, Motion for Discovery, Motion for Discovery of Defense Alibi Witnesses, Answer to Motion to Quash, Answer to Motion to Suppress the Evidence. Court ordered the documents filed into the record. The Defense counsel, filed an Application for Bill of Particulars and Motion for Discovery and Inspection. Court ordered this document filed into the record.
6/27/86	On Motion of the State, continued until 7/18/86 at 9:00 A.M.
7/18/86	State filed a Motion and Order for Writ of Habeas Corpus Ad Testification.
7/18/86	The Defendant was present and represented by his counsel Numa Bertel. Matter continued on Motion to Suppress I.D. and Discovery for 7/28/86.
7/24/86	Defendant present Represented by Numa Bertel, For Trial, reset for Trial 7/18/86 at 9:00A.M. Was set for Hearing on Motion for 7/28/86.
7/25/86	Deft present and represented by his court appointed attorney, Numa Bertel for Trial. Set for Trial 9/18/86 at 9:00 A.M. previously set for Hearing on Motions for 7/28/86.
7/28/86	Numa V. Bertel Jr., Atty for defendant, filed Motion for Appointment of a Sanity Commission. Court ordered the motion filed into the record, and ordered that Dr. I Medina and Dr. Ritter known to the court to be qualified experts in mental diseased, be and they are hereby appointed to determine the mental condition of the defendant at the time of the commission of the alleged offense herein and at the present time. Set for Lunacy Hearing on 8/14/86 at 9:00 A.M.
8/14/86	Deft was present in court for a Lunacy Hearing and was represented by his Atty, Clyde Merritt. Def withdrew his Motion to Appoint a sanity commission. Dr. Ritter's and Dr. Medina's report was filed into the record. Trial was previously set for 9/18/86
9/18/86	Deft present in court and represented by his court appointed atty Numa Bertel and Philip Johnson, joint motion of the State and Def continued until 10/8/86 at 9:00 A.M. for Status Hearing.
10/8/86	Reset for a Status Hearing on 11/6/86 at 9:00 A.M.
11/5/86	Philip Johnson, counsel for the defendant, filed a motion for change of Venue, a Motion for Discovery of Original Police Report, and Motion in Limine. Set for 11/10/86.

O V E R

6

DOCKET MASTER

ORLEANS PARISH CRIMINAL DISTRICT C[illegible]

CASE NO. 313-962

DATE	PROCEEDINGS
11/6/86	Set for Status Hearing on 11/10/86.
11/10/86	Deft represented by Numa Bertel, Jules Edward and Philip Johnson for deft. Set for Trial as to this case on 12/17/86 at 9:00 A.M.
12/17/86	This matter is set for Trial on 1/12/87 at 9:00 a.m.. This matter was continued by the Defense.
1/9/87	Defendant was present in Court this date and was represented by his attorney, Mr. Numa Bertel. Michael McMahon, ADA, filed an oral Motion of his intention to introd witnessess and victims of other crimes during the sencond phase of theTrial. This is set for Trial 1/22/87 at 9:00 a.m.
1/14/87	Philip Johnson, Jules Edwards, and Numa Bertel, attorneys for the Defendant, filed and Order for Issuance of a Subpoena Duces Tecum, a Motion of Individual Voir Dire Prospective Jurors, and a Motion and Order for Production of Transcripts in this ma Matter is set for Trial on 1/22/87 at 9:00 a.m.
1/16/87	Michael McMahon, ADA, filed a Motion and Order for Writ of Habeas Corpus Ad Testifi in this matter. Matter is set for Trial on 1/22/87 at 9:00 a.m.
1/20/87	Michael McMahon, ADA , filed State's Notice of Intent to Use Evidence of Defendant' Prior Convictions at Penalty Phase of Trial. Set for 1/21/87 at 9:00 A.M. for Ruli the Motion for New Trial on the armed robbery cases.
1/22/87	Julian Parker and Michael McMahon, ADA for the State and deft was present in court and represented by his attorneys, Numa Bertel, Clyde Merritt, and Philip Johnson. Numa Bertel filed a Motion to continue trial, which was denied by the court. Defens also filed a Motion to have the Jury View the scene of the crime which was granted by the court. Defense has filed a Motion in Limine: State marked for ID State's Exhibits 1 thru 6. State marked for ID State's Exhibit 7 and 8. State then marked for ID Exhibits 9 and 10. A stipulation was made and agreed upon that Dr. McGarry is capable of rendering an opinion as to the cause of the Victim's death. State then marked for Id Exhibit 11, 12, 12,14,15. St Exhibits 12,14 and 15 were offered into evidence and admitted over the objection of the Defense. State offered and filed, and introduced Exhibits 1-6,8,10,11,12. 13-15 were previously admitted into evidence. These three are slides and will not be blown up and admitted by the State Court recessed until 1/23/87 at 9:00 A.M.
1/23/87	Jurors and all officials of the court visited the crime scene at Desire and Florida Avenue. Once back in the court, the defense asked for a mis trial because of their objection to the jurors being at the scene of the crime and the coverage of this event by the media. Court denied the motion for a mistrial. At four different tim during the cross examination of Tommy Cage a motion for a Mis Trial was made by the Defense. All four motions were denied by the court. Defense called Geraldine Thomps to the stand, but she never took the stand because when the rule of sequestration w invoked, she did not leave the courtroom. Court, however, allowed a stipulation to be made that if Ms. Thompson were to testify that she would testify that Tommy Cage waited for police to arrest him at his mother's house and that Detectives Winnans, Adams, and Gebbia were at the defendant's house at 2:30 and spoke to his mother and cage was not present at that time. After the detectives left, cage came home and hi family notified the police for him. Objection was made to Dr. Roy testifying, no prior notice to State was given of this testimony. Defense first laid the predi cate to establish that Dr. Roy is an expert in the field of addictionology. State crossed examined the doctor to determine his qualifications. Court did not fine him be an expert in that field, but did find him an an expert in the field of general practice. Verdict: Guilty as charged of first degree murder. Defense moved to rece the penalty phase of this trial until a later time. This motion was denied by the SENTENCING PHASE: A stipulation was made at this time that the defendant is one and same person which is named in the Multiple Offender Bill of Information. A Motion f a Mis Trial was denied by the court. State offered into evidence St Penalty No 1 a State Penalty No. 2. St penalty no 1 is admitted without objection and St Penalty n 2 is admitted over the objection of the Defense. Arthur Johnson, Sr. was called to the Stand, Objection was made by the Defense to this witness testifying and the objection was sustained by the court. Defense made a motion for a mis trial and the motion was denied by the court. Defense rested and moved for a mistrial. Motion wa

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

DOCKET MASTER

...nd 5 PARISH CRIMINAL DISTRICT C...

STATE OF LOUISIANA
vs.
TOMMY CAGE

VIOLATION(S):
R.S. 14:30
FIRST DEGREE MURDER

CASE NO. 313-962
SECTION: J
CLASS: 1 st

APPEAL

APPEAL

SECOND MASTER

DATE	PROCEEDINGS
1/23/87	denied by the court, Defense moved for a mis trial 3 times and all three times was denied by the court. VERDICT: DEATH IN THE ELECTRIC CHAIR. Set for Sentencing on 3/27/87 at 9:00 A.M. Court has ordered a Pre Sentence Investigation into the Background of the deft. Sentence set for 3/27/87 at 9:00 A.M.
3/27/87	Court's motion, reset for 4/24/87 at 9:00 A.M. for Sentencing.
4/24/87	Reset for Sentencing 5/29/87 at 9:00 A.M.
5/29/87	Court reset Sentencing for 6/30/87 at 9:00 A.M.
6/30/87	Defendant present for Sentencing. Reset for Sentencing on 7/28/87 at 9:00 A.M.
8/28/87	Defendant present in Court this date for Sentencing represented by Philip Johnson. The Court sentenced the Defendant to Death By Electric Chair, Defendant noted to the Court his intention to file an appeal, andthe Defense counsel is to file a written Motion of Appeal in support thereof. OUT OF SEQUENCE:
7/28/87	Reset for Sentencing on 8/28/87 at 9:00 a.m.
9/1/87	Numa Bertel, Counsel for the Defendant has filed a Motion to Appeal in this matter. The return date on this appeal is 11/5/87. The Court reporter responsible for the transcript is Eve Kazik. The Defendant, Tommy Cage represented by Numa Bertel filed written Motion for Appeal. Court granted the Motion and ordered the appeal returnable to 4th Circuit court of appeal on 11/5/87. The appeal taken is in Forma Pauperis. Court Reporter Eve Kazik.
9/18/87	Clerk's Office filed certification of Notice of Appeal to the Appellate Court.
11/16/87	An Extension of Time Within which to File an Appeal was filed in this matter, the Court Granted the extension of time from 11/5/87 to 12/5/87 to file the appeal.

5

APPENDIX C- DENIAL OF APPLICATION OF REHEARING BY THE LOUISIANA SUPREME COURT

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE # 007

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 18th day of January, 1990, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARING GRANTED; SEE PER CURIAM:

89-CA-1397 Big Diamond Truck Service, Inc., et al vs. Louisiana Public Service Commission
See Per Curiam.
WATSON, J., would grant for a full rehearing.

REHEARINGS DENIED:

87-KA-2778 State of Louisiana vs. Tommy Cage
DENNIS, J., would grant a rehearing.

88-K-2809 State of Louisiana vs. Nine (9) Savings Accounts
c/w
89-K-0501 &
89-K-0579

89-C-0093 Lillian Callais Boyer vs. Lanette Seal and American First Insurance Company

89-K-0712 State of Louisiana vs. Robert Harrison

89-C-1319 Sidney Morris, Individually and on behalf of the Minor, Sakinah Morris vs. Orleans Parish School Board

under one of those circumstances that I mentioned, and the circumstance is during an armed robbery.

Okay. Manslaughter. Again, this doesn't apply. It's a heat of blood killing when something -- another person aggravates another such that a reasonable person would basically lose his temper, lose his cool. You see a lot of those in domestic situations or barrooms. Manslaughter doesn't apply here. I guarantee that.

BY MR. MERRIT:

Your Honor, that's an objection. I ask the Court to --

BY THE COURT:

Sustained, Mr. Merrit.

BY MR. MERRIT:

Let me finish my objection.

BY THE COURT:

You don't have to argue. Objection is sustained. Stay off of that, please. Do not argue the case. Just present the law to the jurors.

BY MR. MCMAHON:

Yes, Your Honor. Now, the big thing about -- again, I mention one other topic. It's specific intent. I'm not going to ask you this individually. Obviously, you cannot go inside somebody's head. We can't mark something with an evidence tag and say, "Here's Tommy Cage's specific intent." What the law says is that we show the specific

It's not the same Reginald Lewis because I know who he is. He's not in this state.

BY MR. BERTEL:

I'm sorry, I didn't hear.

BY MR. MCMAHON:

Didn't you earlier this month indicate that you were against the death penalty?

BY MS. PENN:

You're confused.

BY MR. MCMAHON:

Again, now, this means consider it. Seriously consider it.

BY MR. MERRIT:

No, not seriously consider it. Consider it is the only requirement.

BY THE COURT:

Sustain that.

EXAMINATION BY MR. MCMAHON:

Meaning, ladies and gentlemen, it's not a thing where you just go back and say, well, okay, you considered it but you could never impose it. I just want to make that clear. You will never sit in a more serious case, I guarantee that. And again, we have to explore these feelings. This is an extremely serious case.

BY MS. PENN:

Can I say that when you are saying consider it, I would have to listen to it and be convinced beyond a shadow of a doubt?

BY MR. MCMAHON:

I'm going to reurge to accommodate this juror.

BY MR. MERRIT:

I object to the comments, Judge.

BY THE COURT:

Sustained.

BY MR. MCMAHON:

I will reurge my challenge for consent motion.

BY MR. MERRIT:

Your Honor, again, at this time I move for a mistrial.

BY THE COURT:

I don't want to argue. Mr. McMahon, you are going to have to move on. I will deny the challenge for cause at this time. Proceed.

BY MR. MCMAHON:

Mr. Palazola?

BY MR. PALAZOLA:

I have no problems with that.

BY MR. MCMAHON:

Mr. Cooper?

BY MR. COOPER:

No problems.

BY MR. MCMAHON:

Mrs. Ranson?

BY MRS. RANSON:

No problem.

BY MR. MCMAHON:

Mr. Fouchea?

BY MR. FOUCHEA:

No problems.

BY MR. MCMAHON:

Just a few more questions. Again, now, Ms. Penn alluded to something which is actually a phrase beyond a shadow of a doubt. Now, our burden -- Mr. Parker's burden and my burden is to prove this case to you beyond a reasonable doubt. Okay? Reasonable doubt. That does not mean beyond all doubt or beyond a shadow of a doubt, and I submit to you that we will meet that burden today.

BY MR. MERRIT:

Your Honor --

BY MR. BERTEL:

Arguing, Judge.

BY THE COURT:

Don't argue, Mr. McMahon.

EXAMINATION BY MR. MCMAHON:

The point is under the law you can't hold us to proving the case beyond all doubt or beyond a shadow of a doubt. That simply cannot be done. As we know, there are only two sure things in life, death and taxes. There was no video camera at that bus stop on Florida and Desire on April 16. Even with a video camera there would be an agument to say whatever. But we are going to present this evidence to you, and we are going to present it to you so that you can assess it and determine if we have proven the case up to you as a first degree murder

meter maids, but probably everybody has had experiences with them, so that really doesn't count. But really, any kind of bitterness that anyone close to you, a relative, a friend, yourself. Or something that you have heard, that you have read, that you have formed an opinion that well, you know, the system stinks or whatever. Or, you know, "It's pay-back time for me now. I don't like the police. I can't like the system. So, I'm going to get up here and automatically be a little plant and vote not guilty." Something like that. It happens unfortunately. For example, we had --

BY MR. MERRIT:

It doesn't happen. The jurors are presumed to be honest people.

BY THE COURT:

I would sustain that. Mr. McMahon, please ask these particular jurors if they have any preconceived ideas, notions, or prejudices which would prevent them from being impartial in this case. Please do not go into examples or anything. I do not find that to be proper. Sustained.

EXAMINATION BY MR. MCMAHON:

Ms. Penn, Mr. Fouchea?

BY MR. MERRIT:

What's the question? He can't ask it and now he's asking for an answer? I don't understand it.

BY THE COURT:

Objection is overruled. That's proper. Go ahead, Mr. McMahon.

EXAMINATION BY MR. MCMAHON:

That's about it. I've gone over the main points in this case. You know, you have sat through a lot of voir dires, and I think i can probably find them to be boring things. But they are vitally important. They are vitally important. Does anybody have any specific questions? Anything that has come up? Okay, Your Honor. Again, I'm going to reurge a consent challenge --

BY MR. BERTEL:

Judge, I object. The Court has ruled.

BY MR. MCMAHON:

He is interrupting me to accommodate this woman.

BY MR.MERRIT:

The State is accommodating the nice guys that they are. We ask for a mistrial.

BY MR.BERTEL:

It's improper by the District Attorney to attempt to curry favor with the jury. It's obvious.

BY THE COURT:

I sustain that objection. Denied, Mr. McMahon.

BY MR. MCMAHON:

Thank you, ladies and gentlemen.

VOIR DIRE

EXAMINATION BY MR. MERRIT:

May it please the Court, Your Honor, and members

No defense. Voluntary intoxication.

BY MR. MERRIT:

That's not the law.

BY MR. BERTEL:

Objection.

BY THE COURT:

Mr. McMahon, you're going to have to direct statements to them in accordance as it is written in the Code. Ladies and Gentlemen, let me caution you at this time. Whatever you might hear from the attorneys, if it conflicts or contradicts with what I tell you at the conclusion of the trial as it relates to the law, then that is what you are to follow. At the conclusion of the trial if anything they say contradicts with what I am going to tell you, you are to follow what I read to you.

VOIR DIRE EXAMINATION BY MR. McMAHON:

Let me read you right from the Code. This is the law, and you will hear it again from the Judge. The fact of intoxicated or drugged condition of the offender at the time of the commission of the crime is immaterial except as follows: Where the production of the intoxicated or drugged condition has been involuntary and circumstances indicate this condition is the direct cause of the commission of the crime, the offender is exempt from criminal

criminal consequences that he actively desired. That what he did -- that the result of his act would be a criminal one, a criminal offense. That's what you have to bear in mind. Any problems with that? And I think we can say the law looks very harshly. It does not favor this type of --

BY MR. BERTEL:

Objection.

BY THE COURT:

Sustained.

VOIR DIRE EXAMINATION BY MR. McMAHON:

Mr. Lewis, any problems? Any questions so far?

BY MR. LEWIS:

No.

BY MR. McMAHON:

Anybody else? Your Honor, once again I am going to reurge basically a consent challenge for Ms. Percy in view of the tragedy she suffered.

BY THE COURT:

Mr. Bertel? Mr. Merrit?

BY MR. MERRIT:

We are playing with straws again. This is not --

BY THE COURT:

Yes or no?

BY MR. BERTEL:

No.

BY THE COURT:

Motion denied.

BY MS. RAMM:

I think I would be objective.

BY MR. McMAHON:

If you feel at all squeamish let us know. So, you can be objective?

BY MS. RAMM:

Yes.

VOIR DIRE EXAMINATION BY MR. McMAHON:

Does anybody have any type of ax to grind against the State, against the prosecution in any way that you would hold it against the State of Louisiana, our side, Mr. Parker and myself. And, as I said, ultimately the victim.

BY MR. MERRIT:

Your Honor, that's the second time. When is he going to quit it.

BY THE COURT:

Sustained. Mr. McMahon, you can't bring in the victim's name. You can ask them if they have any grudges which they feel they would urge if they would go in the jury room and consider this case. But you cannot bring it to a personal level of the victim. That's improper I sustain his objection. I caution you not to do that again.

VOIR DIRE EXAMINATION BY MR. McMAHON:

Ms. Aguilar?

BY MS. AGUILAR:

No.

BY MR. McMAHON:

BY MR. McMAHON:

Q Officer Migaud, to which unit of NOPD are you currently assigned?

A Crime lab.

Q And were you so assigned on April 16th of 1986?

A Yes, sir, I was.

Q And specificallly what do you do in the crime lab itself?

A We are basically as a support unit for the entire police department in regards to major offenses, photographs, collection of evidence, fingerprints.

Q So basically you processed the scene?

BY MR. MERRIT:

He's leading his witness.

BY MR. BERTEL:

Objection.

BY THE COURT:

Don't lead your witness. I'll sustain that.

EXAMINATION BY MR. McMAHON:

Q Did you attend or actually respond to to a call on April 16, 1986, close to the corner of Desire and Florida in an alleyway called Laussat?

A Yes, sir, Laussat Place.

Q What did you do once you arrived?

A Took several photographs of the scene, collected a blood sample off the ground on the scene.

A From Canal Street to Rampart, Rampart down to Elysian Fields. Left turn on Dauphine. Dauphine to Desire. Left turn to Desire and Desire to Florida. Right turn on Florida.

Q I want to direct your attention to approximately 11:45 a.m. on that date. Were you at the corner of Desire and Florida?

A Yes, I was.

Q I want you to tell the Ladies and Gentlemen of the Jury what happened when you opened the doors to your bus at Desire and Florida.

A At the time I pulled up at Desire and Florida to let the passengers on board and some to board on, I seen a bunch of people in my bus start running towards the rear of the bus to run out the back door. So I looked and didn't see anything. So I heard this little old lady say, "This guy's got a gun."

BY MR. BERTEL:

Objection, Judge.

BY MR. PARKER:

You can't tell us what other people said. Just tell us what you saw.

BY THE COURT:

Sustain the objection.

EXAMINATION BY MR. PARKER:

Q Very well. Go ahead, Mr. Turner.

A So I looked down on the doorway. I seen two guys wrestling. One had a pistol in his hand.

Q What happened?

A I tried to get out of the seat, and the guy with the pistol in his hand, he looked at me, and so I stopped. They started wrestling a little harder. So that's when I got out of the seat and ran towards the back of the bus.

Q Did you get a good look at his face?

A Yes.

Q Do you see him in the courtroom?

A Yes, I do.

Q Point him out and describe what he's wearing.

A The fellow right there with the -- I think it's a steel gray jacket on and a black shirt.

BY MR. PARKER:

I would like the record to reflect that the witness has identified the defendant before the bar.

BY THE COURT:

So ordered.

EXAMINATION BY MR. PARKER:

Q What happened when you got up out of your seat?

A I ran towards the back of the bus. By the time

Q Where were you -- were you making your way to the bus at that time?

A No, I was standing back.

Q You were waiting for the crowd to dissipate before you got up to the bus?

BY MR. MERRIT:

He's leading his witness.

BY MR. BERTEL:

Objection.

BY THE COURT:

Sustain that.

BY THE WITNESS:

No, I was just waiting until three or four people be last to get on the bus.

EXAMINATION BY MR. McMAHON:

Q Did you see what caused the people to scatter and run helter skelter that way?

A Well, the first thing I noticed, I seen one little guy being chased around the corner to the clinic by another guy chasing him with a gun. He just stopped.

Q Let's back up a little bit. This is State's Exhibit No. 4, and I'm going to ask you to take a look at State's Exhibit 4 and I'm going to ask you to take a look at Exhibit 4, and again, where would the Desire Supermarket be in State's Exhibit 4?

A That's it right here (witness indicating).

Q Where is the clinic?

EXAMINATION BY MR. McMAHON:

Q Now, what happened?

A Well, as I -- like he turned the corner, and he just ran like to the -- he was still in the parking lot. He ran up and stopped like that and shot him.

Q I want you to get down off the stand, Mr.Lewis. I want you to show the jury how the defendant, Tommy Cage, took aim and shot the first time.

A He just came around the corner and did that and shot once (witness indicating).

Q You can get back up now. What happened to the person who was being chased?

A Well, he got hit somewhere in the back just like bucked, jumped, and fell.

Q Then what happened?

A He ran up to him and I seen him snatch something from around his neck, and he shot him again.

Q Did you hear anything?

A No, I wasn't that close.

Q Were you able to tell if any words were exchanged? If anything was said?

A I wasn't looking.

Q Was the person who was shot -- did he in any way grapple or tangle or fight?

A He was like -- he was paralyzed. He was

these pictures and see if they look familiar.

A That's the picture there that I had picked.

Q How did you see them?

A Just spread them out.

Q Are these all six pictures you saw that day?

A Yes.

Q Did you see any other ones? Did they show you any other stacks?

A No.

Q What did they tell you to do with the photograph that you actually picked out?

A He told me to -- well, the officer who stopped me didn't tell me nothing.

Q After you picked the picture out, did they have you mark any markings on it?

A They brought me to homicide, and they said they would let me talk to homicide. And when I got downtown I gave them my true identity, and we just started talking and I told him what had happened. He told me, he said, well --

BY MR. BERTEL:

Objection to hearsay.

BY THE COURT:

I'm going to sustain that.

BY THE WITNESS:

He told me to --

BY MR. BERTEL:

Objection.

BY MR. McMAHON:

It's all part --

BY THE COURT:

Let's let him say just what he did, Mr. McMahon.

EXAMINATION BY MR. McMAHON:

Q Let's back up a little bit, Mr. Lewis. You stated you picked out this picture?

A Yes.

Q What I am trying to get at, did you write on it at all? Did you make any markings on that photograph?

A He told me to sign my name on the picture.

Q Turn that over. Do you see you name on there?

A Yes, right there.

Q Did you sign your name?

A Yes.

Q That's your full name?

A That's right.

Q Is it dated?

A Yes, it should have a date on it.

Q What was the date?

A 4/17/86.

Q What was the time?

A 10:30.

Q April 17, 1986. Look at the back of the other five and see if you made any other makings on the back of the other five.

A That's my initials. He told me to initial them.

Q You initialed the ones you did not know, but

BY MR. BERTEL:

I object.

BY MR. JOHNSON:

Leading.

BY MR. BERTEL:

Leading question, and this is --

BY THE COURT:

I will sustain it. Go ahead, Mr. McMahon. Rephrase it.

EXAMINATION BY MR. McMAHON:

Q Mr. Lewis, did you make a marking on the back of this?

BY MR. BERTEL:

Judge, this is repetitious.

BY THE COURT:

Overrule that. You can cross-examine him again if you would like,Mr. Bertel. You can answer the question, Mr. Lewis.

BY THE WITNESS:

Is that my signature?

EXAMINATION BY MR. McMAHON:

Q Correct.

A Yes, it is.

Q Why did you scratch it out?

A I didn't scratch it out.

BY MR. BERTEL:

Object, Judge.

BY THE COURT:

Overruled.

EXAMINATION BY MR. McMAHON:

Q Why was it scratched out?

A Because he told me I had to put my initials on the picture that I didn't recognize and sign the picture that I recognized.

Q You just got confused --

BY MR. BERTEL:

Objection.

BY THE COURT:

You can't lead him. I will sustain it as to leading.

EXAMINATION BY MR. McMAHON:

Q Were you confused or not?

A I was confused. It was like saying well put your initials and your signature, and that's what I was doing.

Q Is this the man that shot Arthur Johnson, Jr. on April 16th?

A No, it isn't.

Q And you knew that on April 17th --

Yes, I knew that --

BY MR. MERRIT:

That's leading.

BY THE COURT:

Sustain the objection.

BY MR.McMAHON:

Nothing further.

BY THE COURT:

No further cross-examination?

BY MR. BERTEL:

No questions.

BY THE COURT:

the Desire bus?

A Yes.

Q What did?

A As me and Arthur were standing waiting for the bus, Tommy Cage and his friend walked past in front of us.

Q Well, what is so unusual about that, Terry?

A We felt suspicious, and they kept looking back towards me and Arthur Johnson. So, I told Arthur Johnson to watch himself because I have a feeling -- silly suspicion --

BY MR. BERTEL:

Objection, Judge.

BY THE COURT:

Overruled. You can answer.

EXAMINATION BY MR. McMAHON:

Q Continue, Terry.

A I had a feeling that something was going to happen. So I told Arthur let's both put our medallions in our shirt.

Q Describe the medallion that you had on?

A I had a background, flower shaped,and my name written on a fifty cents size.

Q And what kind of chain did you have?

A A rope chain.

Q And what kind of chain specifically, what was it made out of, do you know?

A No.

Q Was color was it?

A Gold.

A Yes.

Q I want you to describe to the jury what happened as the bus pulled up?

A As the bus came, the people on the bus got off, and I was about to step on the bus. As I was about to step, Tommy Cage had knocked me in my back towards the steps.

Q That man right there?

A Yes.

Q Did you see him?

A Yes.

Q How did you see him if he knocked you down?

A I looked over my shoulder.

Q Did you -- were you on your stomach or your back or what?

A When I looked over my shoulder that was the first time I saw him. Then he knocked me on the steps. My face vent forward and then I turned over. He and Tommy was fighting for my chain. After he saw he couldn't get the chain, that's when he pulled out the gun.

Q Stop right there. Now, you say fighting. Describe to the jury your posture, your position, the way your body was positioned at that time. Were you standing up? Were you sitting down?

A Laying down on the steps.

Q All right. Is this the front door of the bus or the back door?

A The front door of the bus.

Q How were you struggling for the chain? What was the struggle with him like? Go into a little more detail.

A He -- after he saw he couldn't get the chain, he pulled out the gun,and he was putting the gun in my face and like trying to shoot me in my face. But I kept knocking the gun away, and he was still grabbing for the chain.

Q Step off the witness stand for a second. I want you to be Tommy Cage, and I want you to place me where you were. Let's just pretend these are the steps of the bus. I want you to place me where you were. Go ahead.

A I was like that. My feet stretched out.

Q Like this?

A He was on top of me like this. And I was moving your hands --

Q Make me do what you were doing to Cage.

A I was like this, and he was standing, trying to grab. I kept moving my hand. He hit me, and he just kept going and finally got one good grab and he just jerked it and ran.

Q Did he say anything to you?

A No.

Q Did you say anything to Arthur or anybody?

A No.

Q By the way, where was Arthur at that time?

A At that time Arthur was standing. After he saw Tommy pull the gun out he ran.

Q Did you see Arthur run?

A At that time we were still struggling for the chain, so I couldn't get a real good glance that he had ran -- the way he had ran at first.

Q Did you get a good look at his face?

A Yes.

Q And this is the man? He snatched your chain?

A Yes.

Q And he had that gun in you face?

A Yes.

Q How did you feel? What were your emotions like? Can you remember?

A While it was happening?

Q Yes.

A Scared.

Q After he snatched the chain, what did he do then?

A He ran after Arthur.

Q Did you see that?

A Yes.

Q Did you see where Arthur went?

A Into the little intersection. I don't know the name of the street.

Q Was it on Florida or what?

A Not Florida Avenue. It's between two -- a store and a center.

Q Did you see what Cage did at that point after Arthur broke off and ran?

A No.

Q What did you do and where did you go from there? Did you stay on the bus steps or what?

A After he finished he ran after Arthur. I heard one shot. I ran to go see and then I heard another shot.

Q Now, let's -- about how long after you heard -- in other words,how many shot did you hear total?

A Two.

Q How long after the first shot did you hear the second shot, approximately?

A About five seconds. About five seconds after.

Q So, it would be first shot, one thousand one, one thousand two, one thousand three, one thousand four, one thousand five, and then the second shot?

A Yes.

BY MR. JOHNSON:

Objection, Your Honor.

BY MR BERTEL:

Leading, Judge.

EXAMINATION BY MR. McMAHON:

Q You weren't timing this, were you?

BY MR. JOHNSON:

He's testifying, Your Honor.

BY THE COURT:

Overrule that.

EXAMINATION BY MR.McMAHON:

Q You weren't timing this with your watch, were you?

A No.

Q These are just approximations?

A Yes.

Q Did you see Cage fire the shot?

A No.

Q The first shot?

A No.

Q Did you see him fire the second shot?

A No.

Q What did you do after you heard those two shots?

A After I heard the two shots, I went by Arthur, and right then a man told me to go to the Community Center and wait for the police. And I called his parents.

Q Arthur's parents?

A Yes.

Q Did you see Cage at all after you heard those shots?

A Yes, he ran towards the project.

Q Where was he when you saw him?

A Running in the project.

Q In the project?

A Yes.

A Yes.

Q This struggle was with the defendant and whom?

A The fellow right there.

Q Mr. Kendrick?

A Mr. Kendrick.

Q Continue from that point.

A Okay. Well, a lot of commotion, like I say, when he grabbed Mr. Kendrick's medallion.

Q Did you see him grab it?

A Yes.

Q How did he grab it?

A He jerked it off his neck.

Q Did he have anything? Any weapon?

BY MR. BERTEL:

Object to leading questions, Your Honor.

BY THE COURT:

Don't lead your witness.

BY MR. McMAHON:

There's only one way to ask whether he had a weapon or not.

BY THE COURT:

That's not a leading question, Mr. Bertel. I would overrule that as to that question as to whether he had a weapon.

BY MR. BERTEL:

Note my objection.

EXAMINATION BY MR. McMAHON:

Q Did Cage have a weapon?

A Well, at that time I didn't know. Like a couple of seconds later when an old lady took and hollered in the

A I seen that gentleman there. He had a pistol and he shot one time. And the fellow went in the air a little bit and took a flip and hit the ground.

Q What fellow was that? Was that Mr. Kendrick who got shot and took the flip?

A The dead person. Whatever the dead person's name is.

Q Arthur Johnson. You didn't know his name on that day?

A No. I still really don't.

Q Did you see anybody else with the defendant?

A No.

Q And are you sure it is the defendant who ripped the chain off Terry Kendrick's neck?

A Yes.

Q By the way, about how far was the defendant from Arthur Johnson when he fired the first shot approximately?

A I don't know. Approximately seventy-five feet

Q And what did he do after this?

A That gentleman there?

Q Yes.

A He ran behind him.

Q Okay.

A The fellow, he was on the ground. And he ran up behind him, and the young fellow turned his head up to him and

begged him not to shoot him again.

Q Did you hear this?

A Yes.

Q How could you hear this?

A Like I said, it couldn't have been no more than seventy-five feet. I am watching everything while trying to get out the way.

Q Did you go into Laussat at all towards Arthur Johnson and the defendant? Did you follow them?

A Just to the back of the car.

Q So about how far away were you when you actually saw him come upon the body of Arthur Johnson?

A Probably seventy-five feet.

Q What did you hear?

A He said, "Mother Fucker, didn't I tell you don't run?"

Q Who said that?

A That fellow right there. And then the guy looked up at him, and he shot him in the head and he took the medallion and ran across the street.

Q Did you see anybody else shoot?

A No.

Q How many shots did you see again?

A Two.

Q All right. It was this man?

A Yes.

Q Where did you see him after he shot? What

BY THE COURT:

Sustain that objection.

BY MR. McMAHON:

Let the record reflect that the witness is referring to the distance betweenthe witness chair and the second row of chairs in the courtroom.

BY MR. BERTEL:

Excuse me. Based on the last inflammatory remark by the District Attorney, I would move for a mistrial.

BY THE COURT:

That motion is denied.

BY MR. BERTEL:

Note my objection. Judge, I would ask you to admonish the jury to disregard that statement.

BY THE COURT:

Ladies and Gentlemen, you are to disregard the comment that the prosecutor made as to the last question when he stood back there to approximate the distance. You are to disregard that comment totally. Proceed, Mr. McMahon.

EXAMINATION BY MR. McMAHON:

Q Mr. Jones, on April 17th, the next day, did any policemen come to you with any pictures?

A Yes, they did.

Q What did they tell you, if anything, before they showed you these pictures?

in a limber move and as he ran to him, I advanced also. But I didn't want to get too close.

Q How close did you get?

A I got close enough to witness words of exchange. I couldn't hear what Arthur Johnson was saying, because he was lying to the ground. All I seen was him turn his head up to the right and mumble something. I witnessed the defendant, Tommy Cage saying, "Bitch, I told you don't run." He snatched a medallion and shot him in the right side of his head.

Q How far away was the gun from the head when he fired the second shot?

A It was a close range.

Q Give us an approximation.

A About something like that (witness indicating).

Q What did Tommy Cage do after he fired that second shot?

A He fled into the Florida Projects.

Q Have you ever been in the Florida Projects?

A Yes, I have.

Q Where did he run to?

A Lisa --

Q No. Excuse me. Did he go into a building or did he go into a courtyard, or where did he go?

A Into an apartment. Project.

Q I'm going to show you a picture. I show you

into court, had you been using clickums?

A Yes, sir.

Q Regularly?

A Off and on.

Q What do you mean by "off and on"?

A Sometimes I used it, and sometimes I won't. Sometimes I do.

Q Now, at the time this incident happened, the day it happened, had you been using clickums?

A Yes, sir.

Q Do you remember how often you used them that day?

A I think I had two that day, that following morning.

Q What were the circumstances under which you had them that morning?

A Sir?

Q Tell us how you happened to smoke clickums that morning?

A Me and a friend --

Q What is your friend's name?

A Darren.

Q Tell us the circumstances.

A The circumstances was he really invited me, you know, to smoke with him, you know. I said -- i agreed, you know. So, we went to smoking, and that following morning after we got finished, he decided he

that, you know. He say, "Well, that might be it. That looks just like them two dudes," just like that, you know. So, I was going to go over there. So, he say, "Take this," like that, you know. So, he handed me the gun.

Q Who handed you a gun?

A Darren.

Q Go ahead.

A So, he handed me the gun and said, "Take the gun. It looks like they might have something. I said, "All I'm going to do is going to ask them," like that. He gave it to me. I took it. I went over there. By the time I go over there, it seems like -- Terry Kendrick was sitting right. It seems like something was suspicious. You know? I went over there and they had done got up, you know. He had started running.

Q Who had started running?

A Arthur Johnson had started running. So by me firing one shot -- I didn't fire to hit him with the bullet. I just shot just to be shooting, you know. I thought that maybe he was going to stop or something like that. I didn't wnat to shoot him to shoot him or

nothing, you know. I thought when he fell -- at the time he fell, I thought he just fell and slipped down. I didn't know I had shot him or nothing like that. When I got close to him, I seen -- all I seen was him laying down there. I thought he was just laying down there. I snatched the medallion off him. The next thing you know, the gun just went off again, you know? I thought the gun hit him in his arm, his right arm. I didn't really pay no attention, you know? I thought the gun hit him in his right arm. So, I ran in the proejct.

That following night my brother was telling me something about something was on the news about some accident that happened in the Desire and Florida are, you know, around the store. So, I say, "I know something about it." I was telling him, "I know something about it, but I don't know if --" I was still puzzled, you know. Them clickums, I was still on clickums. They had my mind puzzled like that, you know, and I didn't know what to do, you know. I was telling my cousin I wish that little dude is all

Don't answer the question. Wait until I rule before you answer the question.

EXAMINATION BY MR. PARKER:

Q Were you smoking clickers on April 15, 1986, at approximately 2:45 on the corner of Louisa and Galvez?

BY MR. MERRIT:

I object to the question.

BY THE COURT:

Overruled.

BY MR. MERRIT:

Note an exception.

EXAMINATION BY MR. PARKER:

Q Were you smoking clickers that day, the day before you murdered Arthur Johnson?

BY MR. MERRIT:

Before Arthur --

BY THE COURT:

Make an objection.

BY MR. MERRIT:

I object to the phrasing and move for a mistrial.

BY THE COURT:

Motion denied. Rephrase your question, Mr. Parker.

BY MR. MERRIT:

I would ask that you admonish the jury.

BY THE COURT:

Ladies and Gentlemen, disregard the comment made by the prosecutor.

EXAMINATION BY MR.PARKER:

Q The day before -- you admitted to this

Objection is overruled. Proceed, Mr. Parker.

EXAMINATION BY MR. PARKER:

Q You were found guilty by a jury of twelve people who sat right in these same twelve chairs, weren't you?

BY MR. MERRIT:

Note an exception, Your Honor.

BY THE WITNESS:

They did it, that's why.

EXAMINATION BY MR. PARKER:

Q Who deliberated for ten minutes and found you guilty?

BY MR. MERRIT:

I object to the question and the nature of it.

BY MR. BERTEL:

I object, Judge, it's a misstatement.

BY THE COURT:

I will sustain the objection as to that.

BY MR. MERRIT:

I move for a mistrial based on the prosecutor's misconduct.

BY THE COURT:

Motion denied.

BY MR. MERRIT:

Note an exception to the Court's ruling.

EXAMINATION BY MR. PARKER:

Q Let's move to April 15th. Do you remember that day?

A Yes, sir.

Q The day before Arthur was killed. Do you remember that?

A No, she didn't.

Q Was it you brother there at that apartment?

A No, he didn't -- no, he wasn't.

Q You ran pretty fast to get away from there, didn't you?

A I don't remember how fast I was run

Q You remember all the other details about this, don't you?

A It took me a while to remember.

Q Oh. So, you have been thinking about this all these months?

A It's something to think about.

Q And you have been thinking about what you were going to tell these people;weren't you?

A No.

Q You weren't thinking about that?

A I had to think about it. I know what I was going to tell them.

Q How is it you don't remember Lisa and you don't remember that green jumpsuit, but you remember everything else?

BY MR. MERRIT:

It's a fact not in evidence, and it's argumentative. I object on both grounds.

BY THE COURT:

I will sustain that objection.

EXAMINATION BY MR. PARKER:

Q You remember that that gun went off by accident, don't you?

A Yes, I remember because I know it did. I

Mr. Parker, do not comment on the witness' response.

BY MR. MERRIT:

I move for an exception for prosecutory misconduct. Mistrial, Your Honor.

BY THE COURT:

Motion denied.

BY MR. MERRIT:

Note an exception.

EXAMINATION BY MR. PARKER:

Q Now, you say you didn't pay attention to that medallion they had on, right?

A I didn't really pay attention, right.

Q And you say you shot Arthur just to be shooting?

A I didn't say that.

Q You didn't tell this jury, "I ran, and I shot just to be shooting. I thought he slipped down"?

A I didn't know I was going to shoot him, no.

Q You held that gun with two hands, and you didn't know that you were going to shoot somebody?

A I didn't have that gun with no two hands.

Q And you say that the clickers had your mind fuzzy. You didn't remember what happened. You started talking to your brother. That was Don you were talking to?

A What you said?

Q You said, "The clickums had my mind fuzzy." That's what you told your brother, correct? You told that to Don, your brother?

A Yes.

Q Don Thompson?

A I think I told that to my cousin.

Q To who?

A My cousin.

Q So you didn't tell that to your brother?

A Not that I remember.

Q And isn't it a fact that the police came looking for you at 2:30 on the 17th of April, and you weren't home? Detective Winins, Detective Lionel Adams came to your house and talked to your mother?

BY MR. BERTEL:

I object, Your Honor. He is asking the witness to answer something that obviously he doesn't know because he wasn't there.

BY THE COURT:

He has the right to answer the question. If the witness knows the answer to the question he can provide it. If he does not, he can state so. I overrule the objection.

EXAMINATION BY MR. PARKER:

Q You don't know anything about that?

A Not that I remember.

Q It's not like you have got a guilty conscience and you called the police. They had been looking for you, hadn't they?

BY MR. BERTEL:

I object. It's argumentative.

BY THE COURT:

Sustained. It's argumentative.

Q It would sublimate or at least cause a conscious part of a person's memory to be absent but the recall would be triggered from the subconscious by some physical or later stimuli; is that correct?

A That's beyond my level of knowledge.

Q PCP, then, is the -- does it have any other side effects? Is the -- does it have any other side effects aside from desociative anesthetic reaction?

A It has several physiological effects. It causes ataxia, which is clumsiness. It causes mydriasis, which is dilated pupils. It causes nystagmus, which is when youe eyes jump around and they move. It has a number of psychological effects in that PCP users become increasingly irritable, and PCP users move from irritability to paranoia to violence.

Q In that connection, have you ever seen or had occasion to examine a person who was under the state of mind that you have just described?

A Yes.

Q Would you briefly describe what your findings were without violating any confidences or anything? What were your obsevations of a person's ability, for instance, to react and

to do a certain thing? Like,if you asked him to do something, would he do it?

A Well, I can recall several patients that came in acutely intoxicated on PCP. Typically, these people have dilated pupils. They appear frightened. They are real scary people to be around because some normal noise will occur in their presence, and they jump around and attack the physician. They are frightening people to work with.

Q How would you deal, in effect, with these people when you tried to communicate with them? How would you handle that?

A You wouldn't. In the medical setting, what you do is you give these people psychotrophic medication and a quiet room that's preferably dark and give them time.

Q What is psychotrophic medication?

A Medication that acts on the psyche. It's a generic term. Specifically, you would use a medication called Haldol, which is an anti-psychotic medication.

Q Does the use of clickum, as we call PCP, -- does the amount used by a person have any direct effect upon its immediate aftereffects?

A Well, certainly. but the PCP is stored in

rests.

BY THE COURT:

Mr. McMahon? Mr. Parker? Any rebuttal by the State of Louisiana?

BY MR. McMAHON:

No, Your Honor, nothing.

BY THE COURT:

State rests?

BY MR. McMAHON:

State rests.

(LUNCH BREAK WAS TAKEN AT THIS TIME.)

(THE FOLLOWING PROCEEDINGS WERE HAD OUT OF THE PRESENCE AND HEARING OF THE JURY:)

BY THE COURT:

Do you wish to note some objections to the charge I am going to give to the jurors?

BY MR. MERRIT:

Yes, Your Honor. The record should reflect that we had a conference charge. You were good enough to give us your charges before delivering them to the jury, and I am now taking objections before the charges are given.

The first one being to that which you call the general charge. The last paragraph beginning with, "It must be such a doubt as would give a grave uncertainty raised in your minds."

I object to that on the basis of it raises reasonable doubt to a higher standard or a lower standard than contemplated by the law.

BY THE COURT:

Your objection is noted.

BY MR. MERRIT:

On that charge listed as flight: Based on the record as it exists, based on the surrender and the voluntary waiving and the stipulations by the State,we object to flight being given.

BY THE COURT:

Let that be noted.

BY MR. MERRIT:

I have a two-page charge provided to me on attempt, and I can think of no reason why attempt should be given in this particular case with the facts as they are.

BY THE COURT:

As I stated, the only reason the Court gives the charge is because in the Grand Jury indictment it talks about the commission of a first degree murder committed upon Arthur Johnson while in the perpetration or attempted perpetration of an armed robbery.

BY MR. MERRIT:

Meanwhile, in the answer to all of the Bill of Particulars, they said it was, in fact, an armed robbery?

BY THE COURT:

The Defense was put on notice -- the Defense was put on notice by the Grand Jury indictment as to the formal charge,and in the indictment it does charge perpetration

he couldn't grab it. That's why there was only one stipple mark about this far. And then what did he do? He ran into the Florida Projects.

And you heard the witnesses, and I'm not going to go over all the testimony, but you heard what Romales Nevelles said. You saw all those people out on that corner. Most of them were there that day, I guarantee. Every time we have been out there, we see the same --

BY MR.MERRIT:

That's outside the evidence, Your Honor.

BY THE COURT:

Sustain that.

CLOSING ARGUMENT BY MR. McMAHON:

Luckily, Romales Nevelles was there because he was campaigning for Vernon Shorty for whom he worked at the Desire Narcotics Rehabilitation Clinic. Vernon Shorty's headquarters were right down the street. Luckily, Romales Nevelles happened to be there that day. He had enough guts and enough humanity to come forward, and he did --he told what happened. You have got all these different people who don't even know each other. Tony Jones doesn't know Romales Nevelles, who doesn't know Reginald Lewis, who don't know Terry Kendrick. They don't know each other. But their stories fit together because

they are telling you the truth.
And of course, they conceded to you -- they conceded from the wording that he shot and killed Arthur Johnson, Jr. They told you up front. Identity is not even an issue. Because what the -- from the word go in this courtroom yesterday, every thrust has been to come back with a lesser verdict. That has been the entire thrust. That's what they have been doing since the word go. Everything has been geared towards that. Come back with a lesser verdict which will mean justice will not be done in this case.

All we are worried about right now is the verdict of guilty of first degree murder or not. I suggest to you that all the evidence that you heard, all the evidence that you have seen points to only one verdict, that is the just verdict. And it will be an easy thing for you. It would be a cop-out for you to come back with anything less. A cop-out. We've got to do justice here.

Let me tell you another thing. Had this victim, Arthur Johnson, Jr., been the son of somebody --

BY MR.MERRIT:

Your Honor, that's outside -- that's inflammatory, and I would move for a mistrial.

BY THE COURT:

Motion for mistrial is denied.

BY MR. MERRIT:

Admonish the jury.

BY THE COURT:

I will sustain the objection. The jury is to disregard that comment.

CLOSING ARGUMENT BY MR. McMAHON:

That family there deserves --

BY MR. MERRIT:

That's outside the evidence also. That family has been grieved. There's no need to go into that, Your Honor.

BY THE COURT:

Mr. McMahon, you will have to confine your argument to the evidence presented from the witness stand.

CLOSING ARGUMENT BY MR. McMAHON:

I want you to do justice. I am going to read a little law. First degree murder --and the Judge is going to read you the same law. First degree murder is defined in the Criminal Code as the killing of a human being when the offender has the specific intent to kill or inflict great bodily harm during the perpetration of an armed robbery period. That is first degree murder, and that is what we have here. In fact, we have two armed roberies. Terry Kendrick was armed robbed. That was an armed robbery. And Arthur Johnson,

And the fact that he had to murder somebody -- execute Arthur Johnson to get that medallion just goes to show you his intent. Again, I don't believe for a minute -- he was not impaired. The law means that he was impaired to such a degree that he couldn't form -- that he didn't mean to kill Arthur Johnson, Jr. The very idea of that is absolutely, utterly absurd, and you should not consider it for a second.

Where the production of the intoxicated or drugged condition has been involuntary and the circumstances indicated this condition is a direct cause of the commission of the crime, the offender is exempt from criminal responsibility. Throw that out. It doesn't even apply here. Absolutely not. Where the circumstances indicate that an intoxicated or drugged condition has precluded -- prevented the presence of a specific criminal intent or a special knowledge required in a particular crime. The circumstances, "Bitch, I told you not to run?" Those are the circumstances What went before, when he said that, and what went after. Those are the circumstances this book is talking about, and those circumstances mean specific criminal intent. Of course,

they don't want me to talk about the family --

BY MR. MERRIT:

Your Honor, he's doing it anyhow. I have asked for a mistrial. You have admonished him. What is he going to do? Keep abusing the system?

BY THE COURT:

The objection is sustained. Motion for a mistrial is denied. Ladies and Gentlemen, again, you are to disregard the comments made about the family.

Mr. McMahon, please confine your argument to the law and evidence and the reasonable conclusions which can be drawn from it.

CLOSING ARGUMENT BY MR. McMAHON:

Abusing the system? He's in court. He had the protection of the United States Constitution, the Louisiana Constitution given to every criminal defendant.

BY MR. MERRIT:

That is outside of the evidence likewise.

BY THE COURT:

I will sustain that. Don't comment on his objections.

CLOSING ARGUMENT BY MR. McMAHON:

What can he give Arthur Johnson, Jr.? He gave him a cord all right.

BY MR. BERTEL:

Judge, he's doing it. This is a sequential argument following Mr. Merrit's objection.

BY THE COURT:

Do not comment on the objection. Do not comment on his argument or statements during any objections, Mr. McMahon.

CLOSING ARGUMENT BY MR. McMAHON:

The evidence of this case shows you, and you have heard that phrase before, you have heard it on television and you have heard it in movies. But this case, this evidence, those circumstances show you the evidence I am talking about. That he was judge, jury, and executioner, because that was an execution. That was no ordinary murder. He ran that young man down, and he executed him. Executed. This is not a garden variety murder. This is not some shooting in a bar. Judge, jury, and executioner.

You are to retire, and you are to deliberate, and render a verdict. The only possible verdict is guilty of first degree murder. There is no other just verdict. Don't cop out. Let justice be done, and return a verdict of guilty as charged. Thank you.

BY MR. MERRIT:

The Defendant waives his closing argument, Your Honor.

BY THE COURT:

Ladies and Gentlemen, in light of the fact

the Defense has waived his closing arguments, then there is no need for a rebuttal argument by the State of Louisiana. Therefore, it is necessary for me to instruct you on the law that applies to this case.

Ladies and Gentlemen, the Defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt. This means that the Defendant is not required to prove his innocence, but may rest upon the presumption in his favor until it is overcome by affirmative proof. The burden therefore is on the State to establish the guilt of the accused to your satisfaction and beyond a reasonable doubt. It is your duty as jurors to consider all the evidence and then apply the law as given to you by the Court.

If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt , if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such a doubt

as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty. If after giving a fair and impartial consideration to all the facts in the case you find the evidence unsatisfactory or lacking of one any single point indispensibly necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.

The prosecution must establish guilt by legal and competent evidence beyond a reasonable doubt. But the rule does not go further and require a preponderance of the testimony. If you have a reasonable doubt as to any or all grades of the offense charged, you must find the defendant not guilty of that grade or all grades of the offense as the case may be.

You are the exclusive judges of the facts. You alone shall determine the weight and credibility of the evidence. You are to find from the evidence which facts have been proved and which facts have not been proved. In this

connection you determine the credibility of the witnesses according to your impression of their truthfulness.

You may take into account their demeanor, their manner on the witness stand, the probability and improbability of their their testimony, the interest or lack of interest they may have in the outcome of the case, and every circumstance surrounding the giving of their testimony which may aid you in weighing their statements. If you believe that any witness in this case, either for the State or for the Defense, has willfully and deliberately testified falsely to any material facts,then you may disregard the entire testimony of such witness as proving nothing and is unworthy of belief. You have the right to accept as true or reject as false the testimony of any witness according to your impression of his or her truthfulness. You're also the judges of the law,but in a different sense. You receive the law from the Court and apply to the evidence admitted during the trial. It is your duty to accept the law as given to you by the Court and to apply it accordingly.

The Defendant is permitted by law to testify in his own behalf. If he exercises this privilege, he is governed by the same rules in testing his credibility and the correctness of his

statements as every other witness. You have the right to believe or disbelieve him just as he impresses you to the truth or falsity of his testimony. The law requires the District Attorney to make an opening statement explaining the nature of the charge and the evidence by which he expects to prove the same. The law leaves to Defense Counsel the option of explaining his defense and the evidence by which he expects to establish same or of waiving his right to make an opening statement. An opening statement made by the District Attorney or the Defense Counsel is not part of the evidence. It does not prove anything at all in the case. You are to consider only the evidence and the testimony of sworn witnesses who will appear befor you on the witness stand. Should either the District Attorney or the Defense Counsel make statements and fail to substantiate them by the testimon, of sworn witnesses on the witness stand or other competent evidence, you are to place no value whatsoever upon the statements made by them, but on the contrary, you should disregard the same as if never having been uttered.

The indictment in this case is in their accusation or charge against the defendant. It is not evidence of guilt and the fact such an

indictment has been filed is of no weight and does not carry any presumption of guilt. You must not be influenced by it in considering the case. It has no probative value whatsoever. You are not to be influenced by sympathy, passion, prejudice or public opinion. You are expected to reach a just verdict. Each individual must arrive at his or her verdict separately and each juror having in view the oaths he or she has taken and his or her duty and responsibility they are under should have his or her own mind convinced upon all the evidence before conscientiously consenting to a verdict.

In this particular case,Ladies and Gentlemen, as has been explained to you, the defendant is charged with the offense of first degree murder. There are four possible verdicts that you can consider in connection with this charge. The first is that of guilty as charged of first degree murder. The second is that of guilty of second degree murder. The third is that of guilty of manslaughter. And the fourth is that of not guilty.

I will begin by explaining to you what we mean in law by first degree murder. The defendant is charged with first degree murder of Arthur Johnson. First degree murder is the killing of a human being, one,when

the offender has a specific intent to kill or inflict great bodily harm and is engaged in the perpetration or attempted perpetration of armed robbery. In order to -- I'd like to go through this definition by explaining what we mean in the first part of that definition when we say the offender has a specific intent to kill or inflict great bodily harm. Intent. Criminal intent may be a specific or general intent. Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. General criminal intent is present whenever there is a specific intent and also when the circumstances indicate that the offender in the ordinary course of human experience must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. Intent is a state of mind. It cannot be seen or photographed. Though intent is a question of fact, it need not be proved as a fact. It may be inferred from the nature and facts of the case. It may be inferred from the circumstances of the transaction. It may be inferred from all of the circumstances established during the trial. Intent involves pre-

meditation. Criminal intent exists when the act from which the crime results is done willfully. In criminal law premeditation means a design or preconceived plan to commit a crime. It denotes the will and deliberate and continued persistance to commit a crime. It is immaterial whether the intentor premeditation existed for a brief or great length of time before the commission of the crime. It is sufficient if the intent existed for only a moment before the crime was committed. As to murder, the law requires no definite time-frame within which the specific intent to kill or inflict great bodily harm must have been formed. Specific intent may have existed a moment before the act which caused death or it may have been formed a day before or any time before the act which caused death.

As I indicated to you, first degree murder is the killing of a human being when the offender had a specific intent to kill or inflict great bodily harm and was engaged in the perpetration or attempted perpetration of an armed robbery. Armed robbery is defined as -- robbery is defined as the taking of anything of value from the person of another or which is in the immediate control of another by the use of force or intimidation.

In this case armed robbery also requires the initial element that the offender be armed with a dangerous weapon. The term "anything of value" includes any conceivable thing of slightest value. The term must be construed in the broad popular sense of the phrase and must be given the broadest possible construction.

Robbery is the unauthorized taking of a thing of value that is achieved by the use of force or intimidation; that is to say by violence or by putting in fear. If the State alleges that the taking of a thing of value was by force, then there must be evidence of violence to the person. That force must be something more than the mere force involved in the taking if there is no resistance. But the amount of force is immaterial. If there was any resistance by the victim and that resistance was overcome by the slightest violence inflicted by the defendant. Force or violence must precede or accompany the taking. It is not sufficient if the violence comes after the taking. Where the thing of value is taken by means of intimidation or putting in fear, the offense is complete if the taking--if the thing be taken by placing the victim in fear of some personal form. The taking of the thing of value must be against the owner's will.

The term dangerous weapon which is a necessary element of the offense of armed robbery includes any gas, liquid substance, or other instrumentality which in the manner used is calculated or likely to produce death or great bodily harm.

As I've indicated again, in the definition of first degree murder, it is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm during the commission of an armed robbery, during the perpetration or attempted perpetration of an armed robbery.

I will now read for you in the law what we mean by attempt in order to understand that aspect of the definition which requires the attempted perpetration of an armed robbery. Attempt is defined as follows: Any person who having a specific intent to commit a crime does or omits an act for the purpose of and tending directly towards the accomplishment of his object is guilty of an attempt to commit the offense intended. And it shall be immaterial whether under the circumstances he would actually accomplish his purpose. An attempt is a separate but lesser grade of the intended crime, and any person may be convicted of an attempt to commit a crime even though it appears on the trial that the crime intended or attempted was actually committed by such person. Mere preparation to commit a crime shall not be sufficient to constitute an attempt. But lying in wait with a dangerous weapon with the intent to commit a crime or searching for the

intended victim with a dangerous weapon with the intent to commit a crime shall be sufficient to constitute an attempt to commit the offense intended. It is essential to an attempt that there be a specific intent to commit the crime. The test is whether the defendant would have been guilty of the crime charged if his intention had been fully carried out. The requisite of intent need not be proved by direct evidence, but may be inferred from the circumstances. It is immaterial whether there is an actual possibility of committing the intended offense. For example, an attempted homicide may fail because the gun is defective or the poison is not sufficiently deadly. An attempted rape may fail because the perpetrator is impotent. Or an attempted theft may fail because the cash draw looted or the pocket picked is empty. Even though such conditions preventing the completion of the crime are unknown to the offender, they do not prevent his being liable for an attempt. Essential elements of an attempt are specific intent to commit a crime and an overt act directed towards that end.

Thus, in order to convict the defendant of first degree murder, you must find, one, that the defendant killed Arthur Johnson and, two,

that the defendant acted with a specific intent to kill or inflict great bodily harm and, three, that the defendant was engaged in the perpetration or attempted perpetration of an armed robbery.

As to the penalty for first degree murder, whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without the benefit of parole, probation or suspension of sentence in accordance with the recommendation of the jury.

One of the other possible responsive verdicts in this case is that of second degree murder.

Second degree murder has two definitions. I will read the first definition to you. Second degree murder is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm. In order to convict the defendant of the crime of second degree murder, the jury must be convinced beyond a reasonable doubt that the defendant killed Arthur Johnson on the date stated in the indictment and that at the time of the killing the defendant had a specific intent to kill or inflict great bodily harm.

The second definition of second degree murder. Second degree murder is the killing of a human being when the offender is engaged

in the perpetration or attempted perpetration of an armed robbery even though he has no intent to kill or inflict great bodily harm. There are two definitions of second degree murder. The first one being the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm, and the second definition being when the offender is engaged in the perpetiation or attempted perpetration of an armed robbery and has no intent -- even though he has no intent to kill or inflict great bodily harm.

The penalty for second degree murder is as follows:

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without the benefit of parole, probation or suspension of sentence.

The third possible verdict for the jury to consider in this case is that of manslaughter. Manslaughter is a homicide which would be first degree murder or second degree murder, but the offense is committed in a sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the

jury finds that the offender's blood had actually cooled or that an average person's blood would have cooled at the time the offense was committed.

The second definition of manslaughter which the jury is to consider is as follows: Manslaughter is a homicide committed without any intent to cause death or great bodily harm when the offender is engaged in the perpetration or attempted perpetration of any felony other than aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery or simple robbery or of any intentional misdemeanor directly affecting the person. The difference between murder and manslaughter is that manslaughter is an impulsive act committed in the heat of passion, caused by adequate provocation, while murder is one of premeditation and cool reflection upon the natural and probable consequences of the act. The provocation does not excuse the killing all together, but in recognition of the frailty of human nature, the offense is reduced from murder to manslaughter. The law in defining manslaughter does not attempt to set forth in detail what shall or shall not be considered adequate provocation. Whether the provocation is adequate or sufficient to deprive an

average person of his self-control and cool reflection is for the jury to determine. The killing must be the result of the provocation and the act resulting in death must have been committed at the time of the provocation. Otherwise, if done after a lapse of time to allow the cooling of the passion, the killing would be murder. This is to be determined on the circumstances of each case, regard being had to the act by which death was caused and the amount of time which elapsed between the provocation and the act and the conduct of the accused during that time.

The penalty for manslaughter is: Whoever shall commit manslaughter shall be imprisoned to hard labor for not more than twenty-one years.

Evidence: In law there are two methods by which facts can be established. By direct evidence and by circumstantial evidence. Direct evidence is the evidence of material facts relating directly and without inference to the questions at issue or the facts to be proved. Circumstantial evidence is the evidence of material facts which may be incurred from the existence from other material facts relating to the questions at issue or the facts to be proved. Circumstantial evidence is legal and com-

petent evidence and must be considered by the jury together with the direct evidence, if any, which may have been introduced at the trial. The jury should draw inferences only from facts which have been proved beyond any reasonable doubt. When the evidence in the case consists of both direct and circumstantial evidence, you must not convict unless you are satisfied beyond a reasonable doubt of the defendant's guilt. When the evidence in the case consists exclusively of circumstantial evidence, the rule is that assuming every fact to be proved that the evidence tends to prove in order to convict, it must exclude every reasonable hypothesis or theory of innocence.

Evidence of experts. Experts are persons who possess special training, knowledge or experience in a particular field. And they are permitted to express their opinion on matters at issue which are related thereto. But such experts are not called into court for deciding the case. You the jurors are the ones who in law must bear the responsibility of deciding the case. The experts are merely witnesses and you have the right to either accept or reject their testimony and opinions in the same manner and for the same reasons for

which you may accept or reject the testimony of other witnesses in the case.

Identification: The Court instructs the jury that in determining whether or not the defendant has been identified as the person who committed the offense charged against him, if any such offense was committed, you must consider all the testimony in the case, considering the means of identification, the circumstances under which he was identified, the opportunity for identifying the said defendant, the description of his apparel as stated by the witnesses, and the probabilities or improbabilities that it was the defendant. And if after so judging and weighing the evidence you are not satisfied beyond a reasonable doubt that the defendart has been correctly identified as the person who committed the offense charged in this indictment, it will be your duty to find the defendant not guilty.

Previous convictions. If you find from the evidence that the defendant before the crime for which he is now on trial had been convicted of other crimes and if you also find from the evidence these previous crimes and offenses had no connection with the charge in the indictment for which he is now on trial, then I charge you that you are not to consider his having been convicted of the said previous offenses and crimes

as proof of his guilt of this charge, but you are to consider such previous convictions only in deciding the weight you are to give to his testimony as a witness.

Flight. The flight of an accused taken alone does not raise a legal presumption of guilt. The fact of an accused having fled immediately after a crime was committed or after he was accused of the crime, if proved, is merely a fact in the case to be taken into consideration by the jury in connection with all of the other facts in determining the guilt of the accused. Flight may be prompted by a sense of guilt, but not necessarily so. If you find that the accused fled, it is for you to consider in the light of all of the other evidence what was the motive for his flight.

Intoxication. The fact of an intoxicated or drugged condition of the offender at the time of the commission of the crime is immaterial except as follows: Number one, where the production of the intoxicated or drugged condition has been involuntary and the circumstances indicate this condition is the direct cause of the commission of the crime, the offender is exempt from criminal responsibility. Number two, where the circumstances in-

dicate that an intoxicated or drugged condition has precluded the presence of a specific criminal intent or of specific knowledge requiring a particular crime. This fact constitutes a defense to the prosecution for that crime.

Ladies and Gentlemen, the State and the Defendant are entitled to the individual opinion of each juror during deliberation. Any juror may change his or her opinion as a result of reasonable persuasion by your fellow jurors. All twelve of you ladies and gentlemen must agree on the verdict in this case in order to reach a legal verdict. Your verdict must be unanimous.

You may render one of the following verdicts: Guilty of first degree murder. Guilty of second degree murder. Guilty of manslaughter. Not guilty.

When you retire to the jury room you will select a foreperson from among yourselves. Those of you who have not served on a jury you should be instructed that the foreperson of course has no greater rights than any other juror. He or she's sole responsibility is to make sure that everyone is given an opportunity to participate in the discussion and it's also his or her responsibility to fill

out the formal verdict sheet at the conclusion of the trial. If and when you reach a verdict in this particular case, the foreperson is to please do no writing on the front side, do all the writing on the reverse side, and do it as I have on the other side, We, the Jury, find the Defendant Tommy Cage, whichever of the four verdicts you can agree upon and the foreperson signs his or her signature beneath the verdict write the word "foreperson" beneath the signature of the foreperson, write the place, New orleans,Louisiana, and today's date, January 23, 1987. If and when you reach a verdict in this case, Ladies and Gentlemen, you will also be provided with ballot slips. If you agree with the verdict please write the word, yes,on the line next to the wording, "Is this your verdict?" and sign. Pass it up to the foreperson. Again, the foreperson must make sure that there are twelve yes votes in order for you to have a legal verdict since your verdict must be unanimous. All twelve of you ladies and gentlemen must agree on the verdict in this particular case. If during your deliberation you require any additional instructions or you wish to see any of the evidence, please do not hesitate to knock on the door and let the sheriff know.

I will bring you back in and we will discuss any questions you may have. If you wish to see any of the evidence also knock on the door and let the sheriff know, and we will accommodate you. Before I ask the jury to begin its deliberations, are there any requests or instructions by the State of Louisiana?

BY MR. McMAHON:

No, Your Honor.

BY THE COURT:

Or the Defense?

BY MR. MERRIT:

No, Your Honor.

BY THE COURT:

Ladies and Gentlemen, do you have any questions before I ask you to begin your deliberations?

(JURORS INDICATED NEGATIVELY.)

BY THE COURT:

I'll ask you then to please, Ladies and Gentlemen, go with the sheriff and begin your deliberations, and knock on the door if and when you have a verdict.

(THE JURY RETURNS TO THE COURTROOM.)

BY THE COURT:

Let the record reflect that the jury has indicated to me that they have reached a verdict in this case. The foreperson has filled out the form of the verdict sheet.

The verdict is as follows: "We the jury, find the Defendant, Tommy Cage, guilty as charged of

first degree murder. Signed, Thaddeus Fouchea, Foreperson, New Orleans, Louisiana. January 23, 1987."

Gentlemen, if you wish to view the ballot slips, you may do so.

BY MR. MERRIT:

Have you looked at them?

BY THE COURT:

Yes, I have.

BY MR. MERRIT:

Are they all signed, yes?

BY THE COURT:

Yes, they are.

BY MR. BERTEL:

We are satisfied.

BY THE COURT:

Let the record reflect that I have reviewed the ballot slips, and they do indicate that there are twelve yes votes, and they are signed by the twelve persons on the jury. Let the verdict be recorded.

Ladies and Gentlemen, before we proceed, I would ask -- they have indicated to me that the witnesses should be here around 5:30. I will have to ask you all to go into the jury room, and then we are going to proceed with what they call the bifurcated stage of the penalty phase. I will give you the instructions as to what you are to expect and what you will hear and certain instructions before we begin. I can say this:

BY MR. MERRIT:

Forget about it. The law tells you what it is.

He doesn't decide what his youth --

BY THE COURT:

This is his opening statement. He has a right to --

I would overrule that objection.

OPENING STATEMENT BY MR.McMAHON:

He is a mature, hardened criminal. Criminal. The offender was a principal whose participation was relatively minor? No. I would say his participation was relatively major. Any other relevant mitigating circumstance, I can't think of any. Can you?

Now, again, we are in an artificial atmosphere. Don't let the presence of children running around here or anything else. They are there for a reason. They are there to show you that he's got young relatives. But he wasn't thinking of those little kids --

BY MR. BERTEL:

I object, Judge.

BY MR. MERRIT:

What has that got to do with an opening statement?

BY THE COURT:

Sustain that objection.

BY MR. BERTEL:

I wish you would admonish the jury.

BY THE COURT:

Disregard that comment made by the prosecutor, Ladies and Gentlemen. Proceed, Mr.McMahon.

OPENING STATEMENT BY MR. McMAHON:

You are here, Ladies and Gentlemen, to apply the law of this land. The law of the United States of America. A criminal penalty drafted by the legislature and approved by the highest court of this country. You are not going to do something unique here. You are not only people on the face of the earth or in this country. that have sat exactly where you are sitting --

BY MR. MERRIT:

He is arguing his case and not making an opening statement, Your Honor.

BY MR. BERTEL:

your Honor, I object on the grounds that this is an improper comment by the District Attorney to express his personal opinion in the matter.

BY THE COURT:

Mr. McMahon, as to the opening statement, it is just an outline of the case and the evidence by which you expect to prove that. I will sustain that as to the opening statement. That is an improper opening statement. I will sustain that objection.

OPENING STATEMENT BY Mr. McMAHON:

Listen to Ernest Brown. Listen to Yvette Johnson. Think about any mitigation. You are going to have to use your intellect and sense of justice to rise above base emotions and

BY THE COURT:

Yvette Johnson.

AFTER BEING DULY SWORN BY THE COURT, YVETTE JOHNSON TESTIFIED ON HER OATH AS FOLLOWS:

Please be seated. State your name for the record.

BY THE WITNESS:

Yvette Johnson.

BY THE COURT:

Mr. McMahon?

BY MR. MERRIT:

Your Honor, may we have the same guidelines and objecting to first the testimny being offered and --

BY THE COURT:

That objection is noted.

BY MR. MERRIT:

Objection for each and every question that will be asked.

BY THE COURT:

The objection is noted, Mr. Merrit.

DIRECT EXAMINATION

BY MR. PARKER:

Q Yvette, I want you to introduce yourself to the jury.

A Yvette Johnson.

Q Yvette, are you nervous right now?

A Yes, I am.

Q Have you been in this courtroom before?

A Yes, I have.

Q Were you nervous the other times you were here?

this man?

A Yes.

Q Now, you say your son -- your brother, has never done anything violent before this, correct?

A Yes.

Q And would your opinion of him change if I told you that on September 27, 1985, he was arrested at 3400 Laussat Street for possession of a concealed weapon? Would that change your opinion?

A No, it wouldn't .

Q Would it change your opinion of him if I told you he was arrested at 3559 Florida Avenue for resisting arrest and assault --

BY MR. MERRIT:

Objection, and I would move for a mistrial.

BY THE COURT:

Motion is denied.

EXAMINATION BY MR. PARKER:

Q Would it change your opinion of him if I told you he was arrested at 3559 Florida Avenue?

BY MR. MERRIT:

On what basis might I ask is the --

BY MR. BERTEL:

Objection, Judge.

BY MR. MERRIT:

How does it become material?

BY THE COURT:

The motion for the mistrial is denied as to that, Mr. Merrit. I denied the motion for a mistrial. I will sustain the defense's objection to the question, Mr. Parker.

BY MR. PARKER:

Approach the bench?

BY THE COURT:

Sure.

(BENCH CONFERENCE)

BY THE COURT:

All right. The objection is sustained. You may proceed, Mr. Parker.

BY MR. MERRIT:

Admonish the jury. Your Honor, I am not satisfied.

BY THE COURT:

Ladies and Gentlemen, you are to disregard any comments made by the prosecutor as to the arrest -- as to any arrest which he alleges Mr. Cage has suffered during his lifetime. You are to disregard any comments made by the prosecutor in questioning this witness as to any arrest that Mr. Cage -- anything that he was arrested for, you are to disregard that. You are not to consider it during your deliberations.

Proceed, Mr. Parker.

BY MR. PARKER:

Yes, Your Honor.

EXAMINATION BY MR. PARKER:

Q You say your brother is not a violent person?

on a railroad for fifteen years to send his son to law school?

A No, I didn't know that.

BY MR. BERTEL:

I object, Judge. As to the relevancy.

BY THE COURT:

Sustained.

BY MR. PARKER:

No other questions.

BY THE COURT:

Call your next witness.

BY MR. BERTEL:

Tommy Cage.

BY THE COURT:

Tommy Cage, you're still under oath.

AFTER HAVING BEEN PREVIOUSLY SWORN BY THE COURT, TOMMY CAGE TESTIFIED ON HIS OATH AS FOLLOWS:

Mr. Bertel?

DIRECT EXAMINATION

BY MR. BERTEL:

Q Tommy, you have sat through this trial. You know this jury has found you guilty of first degree murder?

A Yes, sir.

Q How long have you been in jail, Tommy?

A Nine months.

Q Prior to you going to jail, did you ever counsel with any spiritual person or minister or anybody?

A Yes, I did.

Q Prior to your going to jail?

the Defense is going to arguem. Just as the order of trial -- this is like a mini-trial. Mr. Parker is going to rebut. We do have the burden. The State does have the burden. What I want to do is first start off like this. Again, the entire thrust of the evidence portion in this penalty phase was to create an atmosphere. It was to create an atmosphere. You will notice Mr. Bertel's voice became very hushed when he spoke to all of his witnesses: Ms. Thomas, Mrs. Thompson, to Father -- very, very hushed. Almost reverential tone.

BY MR.MERRIT:

Your Honor, what is this? Is he a play director or something.

BY MR. BERTEL:

I object to the personal reference.

BY THE COURT:

I will sustain the objection.

CLOSING ARGUMENT BY MR. McMAHON:

The focus was to take your attention away from reality.

BY MR. MERRIT:

We are right back where he came from. Admonish him, Your Honor. I don't think he should do that.

BY THE COURT:

I will sustain that objection as to closing argument. You have to define the law and the evidence

presented and be reasonable inferences from which you can draw from that evidence presented.

CLOSING ARGUMENT BY MR.McMAHON:

The evidence presented was to take your mind off of the reality of april 16th.

BY MR. BERTEL:

Objection, Judge.

BY MR. MERRIT:

We move for a mistrial.

BY MR. JOHNSON:

This is the third time, Your Honor. We object strenuously tothe continuing prosecutory --

BY THE COURT:

I'm going to sustain the objection as to the evidence presented by the State of Louisiana and the reasonable inferences that can be drawn from that evidence. As to your case in chief, not their case, Mr. McMahon. The objection is sustained. I caution you now to please do not get into that again.

CLOSING ARGUMENT BY MR. McMAHON:

You've already found that Cage was guilty beyond a reasonable doubt and we learned that from the first portion of the trial.

Now, when you went back there to deliberate, and you had a qualm. Maybe you had some kind of qualm because you didn't know about his character and propensities at that point. You may have thought well, all

right. This was an extremely strong case, but I think that any little reservation that you may have had when you went back there to deliberate, I think it was erased by the evidence that we put on in the second portion because you learned that he robbed Ernest Brown. He told Ernest Brown, "Don't you run or I'll shoot you." He robbed Yvette Johnson. He literally ripped the chains off her neck. The same way he did to Terry Kendrick and the same way he did to Arthur Johnson, Jr.

You learned that's a killer. You learned that's an armed robber. He didn't do it once on April 16th, that he did it at least three times. He was convicted of armed robbery, convicted of first degree robbery, convicted of carrying a concealed weapon, and that relates to his character and propensities.

Are you surprised now that he ended up murdering Arthur Johnson on April 16, 1986?

Now from what you know about him now? No. It was a logical progression.

"Don't you run or I'll shoot you." Yvette Johnson, she testified he had a gun. The jury in its wisdom came back with first degree robbery. An implied weapon. She said he had a gun. She saw a gun. She saw him. And he ripped the chains off her neck. And then finally

he culminated that with the murder of Arthur Johnson, Jr.

Based upon his character and his propensities, easily we could have had three murder victims instead of one. Based upon his character and propensities.

BY MR. MERRIT:

Your Honor, this is totally out of line, and I object to it. I move for a mistrial.

BY MR. McMAHON:

I am trying to argue my case.

BY MR. MERRIT:

And you are arguing inflammatory.

BY THE COURT:

The objection is overruled. The motion for a mistrial is denied.

BY MR. MERRIT:

Note an exception.

CLOSING ARGUMENT BY MR. McMAHON:

Go back to April 16th. That should inflame you --

BY MR. JOHNSON:

Objection.

CLOSING ARGUMENT BY MR. McMAHON:

That should inflame any well-thinking person.

BY THE COURT:

Overruled.

CLOSING ARGUMENT BY MR. McMAHON:

Go back there. You've been taking away. The atmosphere created is trying to take you away. Go back to his character and his propensities.

What do you -- we know about his character and propensities. Well, you heard from Father and you heard -- you know now that Cage has been back there for nine month. April, May, June, July, August, September, October, November, December, January. You heard some talk about remorse. And I am talking about character and propensities now. You heard Father say that he met with him twice face-to-face. You saw Father. He's a good man. He was candid. He was forthright. You know that a man like that, had he wanted to see Father, I'm sure he could have made himself available to ask that Father come and visit him. I want to talk to you anytime he wanted. And what do we have? We've got two meetings according to Father, including one today back there in that little room. In Father's own words lasting from ten to fifteen minutes in duration. Let's give him the benefit of the doubt. Let's say fifteen minutes. And let's disregard the one today. That means he met with Father --it translates out to less than two minutes a month. Give the benefit of the doubt further, he met a half hour with Father in nine months. That translates a little bit more than three minutes a month. But yet he gets up there and he spouts things about

religion. That was cynical. It was a cynical use of religion. Think about that. It was using religion as a prop. As a prop. Just like you have in a play or in a movie. It was a prop to be used today because it's convenient for him to use it to you today. Think about it. Three minutes a month and take away this meeting today. We've got a minute a month. And he is remorseful? And he has found God? Do you believe that? It's all part of his character and propensities.

He is manipulating religion to get you good people to bring you into a trap. Then he's going to spring that little trap and he's going to walk away laughing because he will have won. He will have won.

The first words -- almost the first words you heard out of that attorney's mouth during that phase --

BY MR. MERRIT:

Your Honor, he's back right where we started from. I know that's wrong. No matter what he's going t

BY THE COURT:

I will sustain the objection to what Mr. Bertel and Mr.Merrit might have said.

CLOSING ARGUMENT BY MR. McMAHON:

The character and the propensities. There is only one killer in this room. Only one. Him. You're not going to put anybody to

death. Not you. We have a law. We have laws. We have laws enacted by the legislature. People that we vote for. We have Justices of the Supreme Court of the United States who, as those Justices have decided, that there's nothing illegal or immoral about that law, that sentence.

You are not in a unique position. You are not the only jurors in the world who have had to consider this. Other juries have come back --

BY MR. MERRIT:

That's outside of the eivdence, Your Honor.

BY THE COURT:

I would sustain that as to what other juries might have done.

CLOSING ARGUMENT BY MR. McMAHON:

They don't want you to hear this.

BY MR. BERTEL:

I object.

BY MR. MERRIT:

Mistrial, Your Honor. This is actually prosecutorial misconduct, and nothing less.

BY THE COURT:

The motion for a mistrial is denied.

BY MR. JOHNSON:

Note our objection,please.

BY THE COURT:

Ladies and Gentlemen, you are to disregard that last comment by the prosecutor.

That is out of order, Mr. McMahon. Proceed.

CLOSING ARGUMENT BY MR. McMAHON:

The focus on the character and propensities -- the only reason why that good priest was called was to get you --

BY MR. MERRIT:

It seems to me that we're right back where we started.

BY MR. McMAHON:

I can focus on the character and the propensities.

BY THE COURT:

The objection is overruled.

BY MR. JOHNSON:

Note an exception.

CLOSING ARGUMENT BY MR. McMAHON:

This was to get you to feel guilty because that man was supposed to somehow play upon your better feelings. Some of you may be Catholic. To pray on your better feelings. To make it seem like you are doing something that the Church doesn't sanction, or religion doesn't sanction, or that the Bible doesn't sacntion.

Well, Father was asked what's the position of the Catholic Church on this, but he was not aware of one. And Father was asked to cite chapter and verse as to something from the New Testament which would proscribe capital punishment, but he couldn't come up with anything. He could not come up with

chapter and verse.

Were capital punishment to be immoral or unethical --

BY MR. BERTEL:

Objection, Judge.

BY THE COURT:

Overrule the objection.

CLOSING ARGUMENT BY MR. McMAHON:

-- of the church's position,there would be a clear-cut, definite,articulated, announced position on this. But there's not. Which means that that law that you were going to ask to be -- to apply is not immoral. It's not unethical. It's not wrong. What he did on April 16th is wrong. That's what's wrong. That's what I want you to focus on. And don't be carried away by this atmosphere. Get back to that street. Get back to Laussat. And what he did on April 15th to that little girl from SUNO is wrong. Did you see how scared she was. She was afraid of him. She was scared to death.

And what he did on April 10th, taking Ernest Brown's food stamps. Where do you think Ernest Brown was going to use those food stamps? Was he going to go to Commander's Palace for dinner? No. He was going to feed his family.

BY MR. MERRIT:

That's outside of th[illegible]pe of the evidence. I don't know if the man has a family.

BY THE COURT:

The objection is overruled.

CLOSING ARGUMENT BY MR. McMAHON:

And his little Timex wristwatch worth $23.00.

But Mr. Remorseful over here -- "I am remorseful. I have found religion." Do you believe that? It's a cynical, cynical manipulation.

Don't be folled by that, please. It's very cynical.

Aggravation versus mitigation. Character and propensities. In his short life he has committed more violent acts than 99 percent of the adult population.

BY MR. MERRIT:

That's outside of the scope of evidence, Your Honor. It's not even a fair comment.

BY THE COURT:

I will sustain that objection.

CLOSING ARGUMENT BY MR. McMAHON:

Mr. Remorseful over here. How much remorse did he get back there when he was doing sixty days for carrying a concealed weapon? None. Because he got out after doing those sixty days. And I will bet you a million to one -- I'll bet you a billion to one I will lay down one red cent and I will become rich off of this bet. He didn't make any contact

with any religious person during those two months back there. But it became convenient for him. Something to use at trial. Something to use in anticipation of this that he made his one minute a month or give him the benefit, three minutes a month contact with Father. Did you see the Father? The Father looked burned out, didn't he? He looked tired. He looked burned out. And I think he looked burned out because he has to deal with that kind --

BY MR. MERRIT:

Outside of the evidence again. I don't understand this, Your Honor. He keeps it up.

BY THE COURT:

I will sustain that objection.

BY MR. MERRIT:

That's twenty-five times, Your Honor.

CLOSING ARGUMENT BY MR. McMAHON:

You understand what happened on April 16th Don't be swayed by sympathy and don't let them put a guilt trip on you. He is the killer. He is a proven killer. Armed Robbery, armed robbery, murder, carrying a concealed weapon, armed robbery,armed robbery, murder, carrying a concealed weapon. Armed robbery --

BY MR. BERTEL:

Objection, Your Honor.

BY MR.McMAHON:

And in this trial where he claims remorse.

BY THE COURT:

Overruled.

CLOSING ARGUMENT BY MR. McMAHON:

Where he claims remorse. Watch the progression. don't be fooled.

You all took an oath at the beginning of this trial. You all swore. You said you could consider the imposition of capital punishment. He was judge, jury, and executioner of Arthur Johnson, Jr. He went outside of the system in his renegade way on that rampage. You worked within the system, a legal system, a lawful system. You do the right thing. Just like I said in the argument in the first phase of the trial, it's not going to be easy. But the just thing is not always the easiest thing to do. But you have to do the right thing. And the right thing is to sentence him to death in the electric chair, the same way he sentenced Arthur Johnson, Jr., and he carried out his execution himself. You think back to that day.

Again, this is not your nervous kid in the K & B or Time Saver who panicks and shoots. He sought Arthur Johnson, Jr. out.

When you are back there, I want one phrase to ring out in your mind during deliberations: "Bitch, I told you not to run." And

then you think what came afterward. Don't forget that. Put yourself back there. "Bitch, I told you not to run." Don't forget that.

BY MR. JOHNSON:

Approach the bench, please?

(BENCH CONFERENCE)

BY MR. JOHNSON:

At this time, based on the totality of the conduct of the prosecutor, at this time we are asking for a mistrial. There has been at least twenty-three separate instances where the Court was asked to intervene and did intervene and admonished the prosecutor for the manner in which he presented his closing argument. We are earnestly asking for a mistrial.

BY THE COURT:

Mr.Johnson, that motion is going to be denied.

BY MR.JOHNSON:

Note our exception, please.

BY THE COURT:

It's noted.

Mr. Bertel?

CLOSING ARGUMENT BY MR. BERTEL:

Thank you, Your Honor.

As I told you all in my opening statement, I wanted to make some remarks to you about the reasons why I felt you could exercise the ultimate punishment that is available to you.

has introduced you to me and you may have forgotten my name. My name is Julien Parker. I work for the DA's office.

I want to make a few comments on the Defense Attorney's argument. He talks about Tommy Cage and the electric chair. You are not going to commit him to the electric chair, Ladies and Gentlemen. He has already committed himself to the electric chair.

Let's suppose for a minute that you feel sympathetic for him, like Mr. Bertel has just asked you to do. And you commit him to that life in prison. Well, let me tell you something. Life in Angola means life goes on. Where will he be ten years from now? Where will he be? Riding in the prison rodeo, playing softball, working in the fields, watching cable TV? And Arthur Johnson, Jr. is --

BY MR. MERRIT:

Your Honor, that's again outside of the scope of the evidence.

BY THE COURT:

The objection is overruled.

REBUTTAL ARGUMENT BY MR. PARKER:

Where will he be twenty years from nov? I guess he will still be doing the sme thing.

And where will Arthur be? He will still be --

BY MR. MERRIT:

Your Honor, that's the same thing.

BY THE COURT:

Overruled.

BY MR. PARKER:

He overruled that.

BY MR. JOHNSON:

Objection.

REBUTTAL ARGUMENT BY MR. PARKER:

He starts off by teling you that his career is to defend poor and defenseless people. He didn't tell you that he used to be a DA.

BY MR. JOHNSON:

Objection.

BY MR. BERTEL:

That's a personal comment. That's entirely uncalled for.

BY THE COURT:

I will have to sustain that objection, Mr. Parker.

REBUTTAL ARGUMENT BY MR. PARKER:

Well who was there to defend Arthur Johnson?

BY MR. MERRIT:

Your Honor, the constant reference to Arthur Johnson, I have to make the objection. It's time the Court does something about it.

BY THE COURT:

Overruled as to that. The objection is overruled. Proceed, Mr. Parker.

BY MR. MERRIT:

Note an exception.

REBUTTAL ARGUMENT BY MR. PARKER:

Were they out there defending him from his execution?

been talking about for the past two days. When the lady walked out of the courtroom she said, "Arthur, what are you doing here?" Remember, we were trying Ernest Brown. We were trying his case. This didn't have anything to do with the shooting of Arthur Johnson. Because of that -- before Ernest Brown even testified, before he even walked through the courthouse doors, the Judge had to declare a mistrial. It turned out she knew how Arthur had gotten killed. We had no other choice.

But, the third time he was tried again for robbing Ernest Brown. Another thing he didn't tell you was that the jury deliberated for ten minutes.

BY MR. MERRIT:

Your Honor, that's far beyond the evidence.

BY THE COURT:

As to the amount of time the jury took in its deliberation, I would sustain that.

BY MR. PARKER:

It's in the record, Your Honor.

BY MR. MERRIT:

We would ask for a mistrial.

BY THE COURT:

Motion denied.

REBUTTAL ARGUMENT BY MR. PARKER:

But you know that the verdict was guilty as charged.

and Gentlemen, that wasn't enough for him. That one bull's eye and that medallion weren't enough. Maybe he didn't want to -- maybe he didn't want Arthur to come back and testify against him. I don't know. But what did he do next? They talk about mitigation. He walked up to him at an arm's length and told him, "Bitch, I told you not to run." And then he executed him. This little terrorist over here executed that man in cold blood who was armed with nothing more than books.

The defense attorney says, "Well, was this a heinous crime?" Yes, it was. they know that. They have agreed to that. This is about as heinous as they get. A cold-blooded killing for no reason for a man who was running away from trouble, running away from the robbery. Not somebody who resisted and got shot in the process. This is not a man who was trying to defend himself, but a man who was trying to run away and already had a .38 slug in his pelvis. Extremely heinous, Ladies and Gentlemen, a terrible, terrible crime. It screams out for the punishment that he has earned. He earned his punishment. He likes to carry guns and he likes to rob people. And who are we protecting? The Ernest Browns of the world. The Yvette Johnsons

of the world --

BY MR. MERRIT:

Your Honor, that is not the purpose of this jury's verdict, and I ask that they be admonished.

BY THE COURT:

I would overrule that objection, Mr. Merrit.

REBUTTAL ARGUMENT BY MR. PARKER:

The Arthur Johnsons of the world. That's who we are here to protect.

He talked about Cain and Abel. Well, you know, I don't remember anything in my Bible about Cain walking up to Abel and robbing him. I don't rememer that. I don't remember Cain telling Abel, "Bitch, I told you not to run." I don't remember that in the Bible. I don't remember Abel having that bull's eye shot in his behind. I don't remember that. I seem to remember a fight that the two men got into that kind of seems like manslaughter. This is first degree murder, Ladies and Gentlemen, and don't be fooled by that Cain and Abel stuff. Remember, he who lives by the sword shall die by the sword.

The Defense Attorney talks about Jesus on the cross and the good thief and the bad thief. Remember when Tommy Cage was on the witness stand and I said, "Yeah, you did some time on that concealed weapon charge, didn't you?" He said, "Yeah." Now he is sitting here after he hits you all

with his little rehearsed speech that he had memorized on direct examination, I said, "You did sometime on that concealed weapon charge, didn't you?" He said, "Yeah, I did." I said, "Did you find Jesus back then?" And he said, "Who?" I said, "Jesus Christ. Did you find Him back then when you were doing time for that .38?" "No, I didn't find him back then." I submit to you that he found Jesus when you all came back with that verdict.

They argued to you that life is precious, so don't you take his life. Well, you are not taking his life. You are not doing that. You are making a legal decision, a judgment in this case as to what his punishment will be. A punishment that he has already earned. That his whole career as a criminal has built up to, the ultimate. First degree murder. So, don't fall for that. This is another ploy by the defense to play up on your sympathies.

One of the last things he talked about was you getting any kind of satisfaction out of this. I don't know what that's supposed to mean. We are not asking you to do this to get any kind of satisfaction. We asked you all on voir dire could you consider the death penalty. And you all said, "Yes, I could consider the death penalty."

Now it's time for you to hold for me your oath and do exactly that. Your fellow jurors who said, "No, I can't do it," are long gone. The twelve of you weren't squeamish, weren't shy about it. You looked Mr. McMahon and I straight in the eye and said, "Yes, I can consider the death penalty. You give me the case, you give me the circumstances, and I could consider the death penalty." That's why we picked you. It could have been easy to cop out. "No, I don't believe in capital punishment." And you would have walked out the door. And you wouldn't be here at 11:15 on Friday night. You would be somewhere else. But, no, the twelve of you were strong enough to stand up on your oath to say, "Yes, yes, I can consider it." That's what I'm going to ask you to do, Ladies and Gentlemen.

You see, they have been ranting and raving about his rights and constantly moving from one mistrial to another, and they don't want me to talk about Arthur Johnson's rights.

BY MR. MERRIT:

Your Honor, again, he's absolutely right, and I recite Article 774 as the reason for it, of the Code of Criminal Procedure for the Court to review.

BY THE COURT:

I would overrule the objection.

BY MR.MERRIT:

Note an exception.

REBUTTAL ARGUMENT BY MR. PARKER:

Let me tell you something. Throughout this whole proceeding he has had the Judge up there to make sure his rights are protected. The Court Reporter is here to take it all down. She was even out there on Laussat Street to make sure it all got recorded. There's three lawyers by his side through this whole proceeding. And you twelve Ladies and Gentlemen of the jury to make the decision of his guilt. Now, what did Arthur have that day? Well,he had the same thing. All wrapped up in one. Ladies and Gentlemen, I introduce you to death. His name is Tommy Cage. You tried him. You found him guilty of being a bitch. Ran him down, and executed him in that very same spot on Laussat Street that you walked by earlier this morning. I say if there is any murder that ever screamed out for the death penalty, the murder of Arthur Johnson, Jr. is the one. Thank you.

BY THE COURT:

Ladies and Gentlemen, having found the defendant guilty of first degree murder, you must nov determine whether the defendant should be sentenced to death or to life imprisonment without the benefit of

I will, however, note your objection to my denial of the request at this time.

BY MR. MERRIT:

Thank you, Your Honor.

BY THE COURT:

The court stands in recess awaiting the jury's recommendation.

(THE JURY RETURNS TO THE COURTROOM AT THIS TIME.)

BY THE COURT:

The form of the verdict is not in the form as I have given it to the jurors. I am going to ask the Foreman again to complete the form. You all can come and view this if you would like at this time. I'm going to have to ask him to complete the form and put the verdict in proper form. Mr. Bertel, Mr. Parker, if you all wish to view this.

(THE FOREMAN OF THE JURY COMPLIES.)

BY THE COURT:

Conforming with Article 813, the verdict that I have received from the jury -- the jury has returned in open court and indicated to me that they have reached a recommendation to the form of the -- as to a recommendation as to the penalty phase. I have revieved the ballot slips. I find that the jury is unanimous in its recommendation. The form of the verdict, however, is not in the proper form as I have set forth, as I

have requested that it be done. The Foreperson, after having been instructed at the bench by myself and Mr. Bertel present, I have asked him to place the verdict in proper form. He is in the process of doing that at this time. As the Foreman was placing the verdict in proper form, Mr. Merrit has raised an objection to this procedure. 813 would require that I read the verdict as it has been presented tom e by the jury and record my reasons for refusing to accept this particular verdict at this time. If that is what you want me to do, Mr. Merrit, I will do that.

BY MR. MERRIT:

Yes, Your Honor.

BY THE COURT:

All right,let the record reflect that we are in open court and the jury has returned to me the following recommendation: Having found the below listed statutory aggravating circumstance or circumstances, and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death. The form is improper in that for aggravating circumstance or circumstances found, the Foreman has filled it out from the list that I have provided him with circumstances,and he enumerated A, C, D, and

G. Subpart A lists a number of aggravating circumstances. The offener was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery or simple robbery. Subpart C of the aggravating circumstances which I have provided to the jury indicates the offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated escape, armed robbery, or aggravated kidnapping. Subpart D indicates the offender knowingly created a risk of death or great bodily harm to more than one person. Subpart G indicates the offense was committed in an especially heinous, atrocious , or cruel manner. I will not record this verdict at this particular time. I have read the verdict. I will not record it at this particular time. I am directing the Foreman to again complete the form of the verdict and place the verdict in the proper form in compliance with your request and in compliance with Article 813 of the Code of Criminal Procedure. At this time I am asking the Foreman to please complete the process.

BY MR. JOHNSON:

Your Honor, if I might be heard. In 813, in order

to do this, it requires that the jury be remanded to the sequestration place where they originated the verdict in the first place.

BY THE COURT:

The only reason I am asking the Foreman to do it at this particular -- on the witness stand is because of the bench conference with Mr. Bertel. It is my appreciation that he had no objection to this proceeding at this oint.

In compliance with 813, I will ask you,please,Ladies and Gentlemen, to return to the jury room. I will return all the papers to you. I will ask you to please go with your Foreman and I cannot accept the verdict unless it is in the proper form.

(JURY LEFT THE COURTROOM.)

(JURY RETURNS TO THE COURTROOM AT THIS TIME.)

BY THE COURT:

Again, I am going to find that the recommendation of the jury has not changed.I find, however, that it still is not in the form --in the proper form in that it does not conform to the precise requirement. To the jury and to the Foreman, Mr. Fouchea, it has to read word for word. Word for word as I have it on the form. You cannot leave out a word. In the matter of law it would not put it in the proper form. It must read word for word as I have it. I

will ask you to go back in the jury room with your fellow jurors. If this is your recommendation, you can ask your fellow jurors,you can read it to them and make sure it is word for word in proper form.

(THE JURY LEAVES THE COURTROOM.)

(JURY RETURNS TO COURTROOM AT THIS TIME.)

BY THE COURT:

As to Subpart C on the form of the verdict, the word under aggravating circumstances, the offender has been previously convicted of an armed robbery. The word "unrelated" is left out as I have it in Subpart C under aggravated circumstance. I am going to instruct the Foreman of the jury if this is his verdict -- if this is the unanimous verdict of the jury please place the word "unrelated" between the word "and" and "armed robbery".

(FOREMAN OF THE JURY COMPLIES.)

BY THE COURT:

Under Subpart G under aggravating circumstances in which the jury recommended that the offense was committed in an especiallly heinous, atrocious or cruel manner,if that is the recommendation of the jury, please place the word "atrocious" after the word "heinous".

Let the record reflect that we are in open court and the jury has indicated to me that they

have made a recommendation to the penalty phase. I have reviewed the ballot slips. I find there to be twelve yes votes. The following recommendation of the jury is: Having found the below listed statutory aggravated circumstance or circumstances, and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death. Aggravating circumstance or circumstances found: A, the offender was engaged in the perpetration or attempted perpetration of armed robbery. C, the offender has been previously convicted of an unrelated armed robbery. D, the offender knowingly created a risk of death or great bodily harm to more than one person. G, the offense was committed in an especially heinous, atrocious, or cruel manner. Signed Thaddeus Fouchea, Foreperson, January 24, 1987, New Orleans, Louisiana.

Gentlemen, if you wish to view the ballot slips, you may do so.

BY MR. JOHNSON:

Your Honor, at this time, on behalf of the defendant, under Article 811, after we review the form, I would ask that they be conformed with.

BY THE COURT:

Ladies and Gentlemen, the Defense has requested an

individual polling of each of the jurors in this particular case. I will state your name, and I will ask each of you the question, "Is this your recommendation?" If it is your recommendation, please indicate to me, yes it is. If it is not your recommendation, please indicate to me no.

BY MR. JOHNSON:

Your Honor, begging the Court's indulgence, I cited 811 as the receptive Article of which I am asking the Court to proceed under. All I am asking for at this time is thaT.

BY THE COURT:

Mr.Johnson, I am going to comply with that.

BY MR. JOHNSON:

Thank you.

BY THE COURT:

Again, Ladies and Gentlemen, as I call your name, I will ask each of you, "Is this your verdict?" Please respond if it is, yes. If it is not, say no.

BY MR. JOHNSON:

Your Honor, begging the Court's indulgence, 811 is not the same Article that I am referring to as it is 812. 811 is a different requirement that the Court has to proceed under in order to --

BY THE COURT:

Mr. Johnson, I don't have any indication from Defense Counsel -- you have not viewed the

polling slips at this point to indicate to me that you are satisfied that this is a legal verdict. The only way I can make sure in a case of this sort that this is a legal verdict for the record, is for the Defense Counsel to indicate to me that you are satisfied that it is a legal verdict or that I poll the jurors individually as to that.

BY MR.JOHNSON:

Begging the Court's indulgence, Your Honor, I don't view it in that way. I would only ask that the Court ask the Clerk to conform to the specific requirements of 811, and I think that would be satisfactory.

BY THE COURT:

Mr. Johnson, in other words, you want me to ask the jurors en mas to indicate,yes this is their verdict?

BY MR. JOHNSON:

According to the Article, Your Honor, that is to be the duty of the Clerk.

BY THE COURT:

The Judge can take -- the Judge has the authority in his discretion to do this on his own if he so desires.

BY MR.JOHNSON:

I am just asking the Court to conform to 811, Your Honor. That's all I am asking.

BY THE COURT:

Mr. Bertel?

BY MR. BERTEL:

Judge, we believe you have the authority to do that.

BY THE COURT:

All right. Do you want the individual polling of the jurors, Mr. Bertel, or en mas?

BY MR. BERTEL:

No.

BY THE COURT:

Ladies and Gentlemen, I am going to read the verdict to you. If you agree with the verdict, please all indicate yes. If anyone disagrees with the verdict, please indicate no.

Having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found: A, the offender was engaged in the perpetration or attempted perpetration of armed robbery. C, the offender has been previously convicted of an unrelated armed robbery. D, the offender knowingly created a risk of death or great bodily harm to more than one person. G, the offense was committed in an especially heinous, atrocious or cruel manner. Signed Thaddeus Fouchea, Foreperson. January 24, 1987, New Orleans, Louisiana.

Ladies and Gentlemen, is that your verdict?

(ALL JURORS ANSWERED IN THE AFFIRMATIVE.)

BY THE COURT:

It is my appreciation that I have heard no negative responses. The unison vote was all yes. I heard no no votes from any of the jurors. I will let the verdict be recorded. Please remand the defendant, Sheriff.

BY MR. BERTEL:

For the record, Judge, we would make a motion for a mistrial based on the manner in which the jury returned the verdict, and in which the Court handled the verdict not in conforming with the Code.

BY THE COURT:

I will deny that motion.

BY MR. BERTEL:

Note our objection.

BY THE COURT:

It is noted.

• • • • •

CERTIFICATION

I, EVE S. KAZIK, CERTIFIED SHORTHAND REPORTER, HEREBY CERTIFY THAT THE FOREGONIG FIVE HUNDRED AND NINETY-SIX (596) PAGES ARE TRUE AND ACCURATE AND WERE TAKEN TO THE BEST OF MY ABILITY AND UNDERSTANDING OF THE TRIAL HELD ON THURSDAY, JANUARY 22, 1987 AND FRIDAY, JANUARY 23, 1987, BEFORE THE HONORABLE LEON A. CANNIZZARO, JUDGE PRESIDING

Eve S Kazik CSR

EVE S. KAZIK
CERTIFIED SHORTHAND REPORTER
CRIMINAL DISTRICT COURT
SECTION "J"

ORIGINAL

Supreme Court, U.S.
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JUL 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

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SUPREME COURT, U.S.

NO. 89-7302

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

TOMMY CAGE

Petitioner

VERSUS

STATE OF LOUISIANA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION BY THE STATE OF LOUISIANA

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.....1

STATEMENT OF THE CASE.....1

REASONS FOR DENYING THE WRIT.....3

CONCLUSION.....8

CERTIFICATE OF SERVICE.....9

TABLE OF AUTHORITIES

PAGE

STATUTES:

La.C.Cr.Pro. art. 905 et seq.....4

La.C.Cr.Pro. art. 905.3.....5

La.C.Cr.Pro. art. 905.9.....7

Rule 28 of the Rules of the Louisiana Supreme Court....7

Miss. Code Ann. Sec. 99-19-101(3)(c) (Supp. 1989).....5

CASES:

Cage, 554 So.2d 39.....4, 7, 8

Clemons v. Mississippi, ___ U.S. ___, 46 Cr. L. Rep. 2209 (1990).....4, 5

Jones v. Butler, 864 F.2d 348, at 370.....6

State v. Deboue, 552 So.2d 355, at 368 (La. 1989).....7

State v. Cage, 554 So.2d 39.....2, 4

State v. Watson, 423 So.2d 1130 5

State v. Welcome, 458 So.2d 1235 4

Wilson v. Butler, 813 F.2d 664.....5

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BRIEF IN OPPOSITION BY THE STATE OF LOUISIANA

STATEMENT OF THE CASE

On April 16, 1986 at about 11:30 a.m., two college students were waiting at a bus stop in New Orleans, returning home from their morning classes. As they attempted to board a

city bus, petitioner Tommy Cage tried to rob them He knocked one student to the steps of the bus, pulled a .38 caliber gun, then jerked a chain from the student's neck. As he did this the other student, Arthur Johnson, tried to run away. The bus driver and three other eyewitnesses testified at trial that petitioner stopped, took aim, and shot Johnson, hitting him in the lower back.

The impact of the bullet knocked Johnson forward and he fell to the ground. Petitioner then ran over to where Johnson lay on the ground, paralyzed. Johnson, according to witnesses, begged petitioner not to shoot him again, but petitioner said to Johnson, "Bitch, I told you don't run." Petitioner then shot Johnson in the head, killing him, took a medallion from Johnson's neck, and ran away.

At trial, after the four eyewitnesses identified petitioner as the perpetrator, petitioner took the witness stand and admitted firing the gun. He testified that he fired the first shot "just to be shooting" and the second time, the gun "just went off again." **State v. Cage**, 554 So.2d 39 (La. 1989).

Petitioner was found guilty of first degree murder by a jury of his peers, and that same jury, after hearing evidence at

a penalty hearing recommended that petitioner receive the death penalty. Petitioner was sentenced to death and his conviction and sentence were affirmed by the Louisiana Supreme Court. Petitioner now seeks review of the Louisiana Supreme Court decision.

REASONS FOR DENYING THE WRIT

The State of Louisiana submits that petitioner's application does not present a substantial federal question for consideration by this court. Although many allegations of violations of federal constitutional law have been made, petitioner has not demonstrated the existence of violations.

I.

THERE IS NO CAUSE TO REMAND
TO THE LOUISIANA SUPREME COURT
FOR CONSIDERATION OF THE
APPROPRIATE PENALTY

Petitioner has alleged that his case should be remanded to the Louisiana Supreme Court because that court "refused to consider the effect that two invalid aggravating circumstances have on the appropriateness of petitioner's death penalty."

Petitioner cites **Clemons v. Mississippi**, ____ U.S. _____, 46 Cr. L. Rep. 2209 (1990), as authority for this request.

The jury below found four aggravating circumstances: (1) Cage was engaged in the perpetration or attempted perpetration of armed robbery when the murder occurred; (2) Cage had previously been convicted of an unrelated armed robbery; (3) Cage knowingly created a risk of great bodily harm to more than one person; and (4) the offense was committed in an especially heinous, atrocious, or cruel manner. **State v. Cage**, supra, 554 So.2d at 45.

The Louisiana Supreme Court held that because the jury's finding of one statutory aggravating circumstance (armed robbery) was supported by the record, it was unnecessary to determine whether the jury erred in its finding regarding the other aggravating circumstances, because the failure of another aggravating circumstance would not invalidate a death penalty. The Court specifically found that no evidence introduced in the case, including the evidence of the other aggravating circumstances, introduced an arbitrary factor into the proceedings. **Cage**, supra, 554 So.2d at 46.

Under Louisiana's capital sentencing scheme, a sentencing hearing is conducted after a verdict of guilty to a first degree murder charge. La.C.Cr.Pro. art. 905 et seq.

The sentence will be life imprisonment unless the jury finds unanimously and beyond a reasonable doubt at least one statutorily defined aggravating circumstance. La.C.Cr.Pro. art. 905.3. However, having found the existence of a statutory aggravating circumstance the jury is still not required to impose the death penalty. **State v. Watson**, 423 So.2d 1130 (La. 1982); **State v. Welcome**, 458 So.2d 1235 (La. 1983). Instead, it is merely authorized to impose the ultimate penalty after considering evidence of any mitigating circumstances. La.C.Cr.Pro. art. 905.3. Unless the jury unanimously determines that the death penalty should be imposed, the defendant will be sentenced to life imprisonment without parole, probation, or suspension of sentence. If the jury cannot agree unanimously as to the sentence, a life sentence is imposed. Any sentence returned must be unanimous.

Unlike Louisiana, Mississippi law provides that for the jury to impose a death sentence, "it must unanimously find....(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances," Miss. Code Ann. Sec. 99-19-101(3)(c) (Supp. 1989); **Clemons v. Mississippi**, 46 Cr. L. 2209, at 2212 (footnote 2).

In context with **Clemons v. Mississippi**, 48 Cr. L. Reptr. 2209 (1990), Louisiana is not a "weighing" state in the sense that a jury in a capital case must weigh the aggravating and mitigating factors and decide the issue of sentencing based upon which factors "weigh" the most. Louisiana jurisprudence and jury charges contain references to weighing, using that term in the sense of comparing the evidence in favor of the death penalty with the evidence calling for a lesser sentence. However, no mandatory result is determined by the "weighing."

The United States Court of Appeals for the Fifth Circuit has explicitly found that "an independent review of the Louisiana sentencing statute, as well as Louisiana case law, reveals that Louisiana law does not require weighing of aggravating against mitigating circumstances." **Jones v. Butler**, on rehearing, 864 F.2d 348, at 370 (5th Cir. 1988); **Wilson v. Butler**, 813 F.2d 664, 673-74, reh'g granted on other grounds, 825 F.2d 879 (5th Cir. 1987), cert. den. 108 S.Ct. 1059, 98 L.Ed.2d 1021 (1988).

The Fifth Circuit in **Jones**, **supra**, also pointed out that "Mississippi law requires a jury to weigh mitigating and aggravating circumstances while, as we have noted, **Wilson** held that Louisiana law does not." **Jones v. Butler**, 864 F.2d 348, at 371.

While the Louisiana Supreme Court does not "reweigh" the evidence in the sense of comparing aggravating and mitigating circumstances and then following that which weighs the heaviest, it does review every death sentence to determine whether the sentence is unconstitutionally excessive. La.C.Cr.Pro. art. 905.9; Rule 28, Rules of the Louisiana Supreme Court. This determination is made upon considering whether the sentence was imposed under the influence of passion, prejudice or arbitrary factors; whether the evidence supports the finding of statutory aggravating circumstances; and whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. State v. Deboue, 552 So.2d 355, at 368 (La. 1989). With this review, neither the eighth nor the fourteenth amendments to the United States Constitution were violated.

II.

THE TRIAL COURT DID NOT IMPROPERLY INSTRUCT THE JURY REGARDING REASONABLE DOUBT

The Louisiana Supreme Court, in its decision below, adequately answered this allegation made by Petitioner. **Cage, 554 So.2d 39, at 41.**

III.

PETITIONER'S SENTENCE OF DEATH DID NOT RESULT FROM VIOLATIONS OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner has alleged numerous violations of constitutional rights. The Louisiana Supreme Court has adequately answered these allegations:

A. Victim impact evidence. A review of the argument complained of (Tr. 435-6) shows the innocuous nature of the argument presented by the prosecutor.

B. Prosecutorial misconduct. See **Cage, 554 So.2d 39, at 43-45.**

C. Noncompliance with Louisiana sentencing standards. See **Cage, 554 So.2d 39, at 41-42.**

D. Error during the penalty phase. See **Cage, supra, 554, So.2d 39, at 42-43.**

CONCLUSION

Petitioner's request for a writ of certiorari to review the decision of the Louisiana Supreme Court should be denied.

Respectfully submitted,

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Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Response to the attorney for petitioner, by United States mail, this 12th day of July, 1990, addressed to:

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Jack Peebles
JACK PEEBLES

ORIGINAL

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NO. 89-7302

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

TOMMY CAGE,

Petitioner

VERSUS

STATE OF LOUISIANA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

SUPPLEMENTAL BRIEF IN OPPOSITION BY THE STATE OF LOUISIANA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

ARGUMENT.....1

CONCLUSION.....9

CERTIFICATE OF SERVICE.....10

TABLE OF AUTHORITIES

CASES:

Bumpus v. Gunter, 635 F.2d 907.....8

Chapman v. California, 386 U.S. 18, 24 3

Cupp v. Naughten, 414 U.S. 141.....3

Dunn v. Perrin, 570 F.2d 21.....5

Francis v. Franklin, 471 U.S. 307, 316.....3

Lanigan v. Maloney, 853 F.2d 40.....5, 6

Lee v. U.S., 106 S.Ct. 849.....8

State v. Cage, 554 So.2d 39.....2, 7

State v. Messiah, 538 So.2d 175 3

State v. Stramiello, 392 So.2d 425.....3

State v. Taylor, 410 So.2d 224.....3

United States v. Ariza-Ibarra, 605 F.2d 1216.....5, 8

United States v. Byrd, 352 F.2d 570.....4

U.S. v. DeVincent, 632 F.2d 147.....8

United States v. Drake, 673 F.2d 15.....6, 8

United States v. Glantz, 847 F.2d 1, 11-12.....8

United States v. Glenn, 828 F.2d 855, 861.....8

United States v. Harrigan, 586 F.2d 860.....5

United States v. Indorato, 628 F.2d 711, 720-721.....5, 8

U.S. v. Love, 767 F.2d 1052.....8

U.S. v. Munson, 819 F.2d 337, 345-346.....8

United States v. Park, 421 U.S. 658.....3

United States v. Wosepka, 757 F.2d 1006.....6

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SUPPLEMENTAL BRIEF IN OPPOSITION BY
THE STATE OF LOUISIANA

ARGUMENT

The Court has asked for a supplemental response to question 2 presented by the Petitioner. In that question, Petitioner alleged that he was deprived of his constitutional right to due process of law because the Louisiana state trial court improperly instructed the jury regarding reasonable doubt.

Petitioner's objection to the trial judge's instructions on reasonable doubt was overruled. The trial judge charged the jury as follows:

> Ladies and Gentlemen, the Defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt.... If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty. If after giving a fair and impartial consideration to all the facts in the case you find the evidence unsatisfactory or lacking of one any single point indispensibly necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. (Emphasis added.)
>
> State v. Cage, 554 So.2d 39 (La. 1989), at 41

The Louisiana Supreme Court held that the use of "grave uncertainty" and "moral certainty," if taken out of context, might overstate the requisite degree of uncertainty and confuse the jury. State v. Cage, supra, 554 So.2d at 41. However, taking the charge as a whole, that Court found that reasonable persons of ordinary intelligence would understand the definition of "reasonable doubt" given by the trial court. That has been the test for jury charges in Louisiana. State v. Taylor, 410 So.2d 224 (La. 1982). See also: State v. Stramiello, 392 So.2d 425 (La. 1980). Similar instructions using these terms have been upheld by the Louisiana Supreme Court. State v. Messiah, 538 So.2d 175 (La. 1988), opinion by Justice Calogero at ftnte 5, 538 So.2d at 184; Taylor, supra.

This Court has held that in interpreting the meaning of a jury charge a court must determine "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307, 316 (1985).

The State of Louisiana submits that the jury charge on reasonable doubt given in this case should not mislead or confuse a juror, and is constitutional. The harmless error doctrine of Chapman v. California, 386 U.S. 18, 24 (1967) should not apply because no error was committed by giving the jury charge.

The instructions must be reviewed in the context of the overall charge. Cupp v. Naughten, 414 U.S. 141, at 146-147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); United States v. Park, 421 U.S. 658, 674, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975).

Petitioner calls attention to six federal appeals court decisions (brief, pps. 17, 18) which he argues recognize that analogous reasonable doubt definitions are error. The State disagrees, and now reviews each of these decisions in the order submitted by Petitioner.

In United States v. Byrd, 352 F.2d 570 (1965) the Second Circuit held that a trial court erred in its failure to properly charge the jury regarding criminal intent. That court commented on various additional parts of the jury charge, without ruling on these additional parts. Byrd, 352 F.2d at 574. One comment made by the court concerned an alternative definition of reasonable doubt offered by the trial court: "It is a doubt to a moral certainty." Byrd, 352 F.2d at 575. The court pointed out that "doubt" and "certainty" are antithetical and the use of them "in this manner and for this purpose" would tend to create more confusion than light in the minds of the jury. Byrd, 352 F.2d at 575.

The brief comment of the circuit court in Byrd does not reveal the context in which the "alternative definition" was used. The State points out, however, that no such alternative definition was offered in the jury charge now being considered by this Court. There are no "antithetical words" in the language used to define reasonable doubt by the trial court below. For this reason, Byrd does not apply.

While the First Circuit in **Dunn v. Perrin**, 570 F.2d 21 (1978) did hold a conviction to be invalid on the ground that there was a possibility that the jury was misled, as Petitioner claims in brief, the Court in **Dunn** did not base its decision on language similar to the language used in the jury charge now before this Court. The Court found that reasonable doubt was improperly defined three times during the jury charge, 570 F.2d at 25, but the Court expressly refused to find error in charging the jury regarding the term "moral certainty." The **Dunn** court held that while authorities differ on the advisability of equating proof beyond a reasonable doubt with establishment of guilt to a moral certainty, it "need not take sides in that controversy...." **Dunn**, 570 F.2d at 24. It did not take sides in that controversy, and did not base its decision on that issue.

Petitioner cites two other First Circuit cases, **United States v. Harrigan**, 586 F.2d 860 (1978), and **Lanigan v. Maloney**, 853 F.2d 40 (1988) in support of his argument. **Harrigan** involved an erroneous instruction that the defendant's evidence had no greater function than simply to raise a reasonable doubt in the minds of the jurors. It had nothing to do with the concepts of "grave uncertainty" or "moral certainty" at issue in the case before this Court. **Lanigan** found error in a jury charge which, reduced to its basics, told the jurors that proof beyond a reasonable doubt meant that the defendant's guilt had to be

proven not merely by conjecture or guesswork but "to a degree of moral certainty." **Lanigan**, 853 F.2d at 46. The primary problem, the court held, was the use of the phrase "to a degree of moral certainty." Said the court, "The judge's instruction essentially told jurors that they needed some undefined amount of - 'a degree of' - moral certainty to find petitioner guilty." **Lanigan**, 853 F.2d at 46, 47. Indeed, the **Lanigan** court stated that the First Circuit has not found use of the phrase "moral certainty" to be constitutional error, citing **United States v. Drake**, 673 F.2d 15, 21 (1st Cir. 1982); **United States v. Indorato**, 628 F.2d 711, 720-721 (1st Cir. 1980); and **United States v. Ariza-Ibarra**, 605 F.2d 1216, 1228 (1st Cir. 1979). **Lanigan**, 853 F.2d at 47, ftnte 4.

In **United States v. Wosepka**, 757 F.2d 1006 (9th Cir. 1985) the Ninth Circuit held, as Petitioner alleges, that a brief jury instruction merely defining reasonable doubt as "a doubt based on reason and common sense" was constitutionally inadequate. The case contains no reference, however, to the definition of reasonable doubt charged by the trial court in the case before this Court. The State finds no language in that decision which might be instructive here.

The State submits that these decisions, relied on by Petitioner, do not control or substantially assist in determining the constitutionality of the jury charge on reasonable doubt given by the trial court below.

"Grave uncertainty" does not define the quantum of uncertainty but rather the nature of the uncertainty. "Grave", with its common dictionary meaning of serious, or important, is descriptive of the type of uncertainty present when a reasonable doubt exists. By using the term, the trial court below contrasted this doubt with a doubt based upon "mere caprice and conjecture." State v. Cage, supra, 554 So.2d 39, at 41.

The sentence in the jury charge containing the term "moral certainty" does not change the meaning of the standard defined by the court. The sentence in question reads: "What is required [in order to convict] is not an absolute or mathematical certainty, but a moral certainty." In context, the trial court was telling the jurors that they should not apply a mathematical formula to the reasonable doubt standard but should be morally certain of the defendant's guilt before convicting him.

The judge below wanted jurors at the conclusion of the trial to be able to go home with the abiding conviction that they could be at ease about what they had done because they were certain they were right if they convicted the defendant. Thus, they must be convinced to a "moral certainty" of the defendant's guilt before finding him guilty beyond a reasonable doubt. Seen in context the charge is not only constitutionally permissible but is favorable to the defense.

The State has found no federal circuit court decisions in which the terms contested here, when used as they were used by the court below, were held to be constitutional error.

Some courts have criticized use of the terms "moral certainty" and "reasonable moral certainty," U.S. v. Love, 767 F.2d 1052 (C.A. 4 1985), cert. den. 106 S.Ct. 848, 474 U.S. 1081, 88 L.Ed.2d 890, cert. den. Lee v. U.S., 106 S.Ct. 849, 474 U.S. 1081, 88 L.Ed.2d 890; U.S. v. DeVincent, 632 F.2d 147 (C.A. 1, 1980), cert. den. 101 S.Ct. 405, 449 U.S. 986, 66 L.Ed.2d 249, but such courts have held that the use of these phrases did not reach the level of legal or constitutional error. The federal First Circuit has frequently discussed this issue. See: U.S. v. Drake, 673 F.2d 15 (CA 1, 1982); Bumpus v. Gunter, 635 F.2d 907, cert. den. 101 S.Ct. 17141, 450 U.S. 1003, 68 L.Ed.2d 207 (CA 1, 1980); U.S. v. Indorato, 628 F.2d 711, 720-721 (1st Cir. 1980); U.S. v. Ariza-Ibarra, 605 F.2d 1216, 1228 (1st Cir. 1979).

Imperfect formulation of the reasonable doubt instruction may meet constitutional requirements when viewed in the context of the entire charge. See, e.g., United States v. Glantz, 847 F.2d 1, 11-12 (1st Cir. 1988); United States v. Glenn, 828 F.2d 855, 861 (1st Cir. 1987); United States v. Munson, 819 F.2d 337, 345-346 (1st Cir. 1987); United States v. Drake, supra; Bumpus v. Gunter, supra.

Petitioner has demonstrated no constitutional error in the jury charge on reasonable doubt given in the trial court below.

CONCLUSION

The petition for certiorari should be denied. There is presently no conflict among the federal circuit courts of appeal on the jury charge at issue and no substantial federal question has been presented for review.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of this Supplemental Brief has been served upon counsel for petitioner by placing a copy of same in the United States Mail, postage prepaid, addressed to:

Hon. Henry D. Gabriel
School of Law,
Loyola University
526 Pine Street
New Orleans, Louisiana 70118

This 7th day of Sept., 1990.

New Orleans, Louisiana

Jack Peebles
JACK PEEBLES
ATTORNEY FOR RESPONDENT

SUPREME COURT OF THE UNITED STATES
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JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

August 28, 1990

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Jack Peebles, Esq.
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Parish of Orleans
619 South White Street
New Orleans, LA 70119

Re: Tommy Cage v. Louisiana, No. 89-7302

Dear Mr. Peebles:

Although you have filed a brief in opposition to the petition for a writ of certiorari in the above case, the Court has directed this office to request a response as to question 2 presented by the petition.

Ten typewritten or otherwise reproduced copies of your response, together with proof of service thereof, should reach this office on or before September 12, 1990.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

Joseph F. Spaniol, Jr.
Clerk

cc: Henry D. Gabriel, Esq.
Loyola University Law School
526 Pine Street
New Orleans, LA 70118

SUPREME COURT OF THE UNITED STATES

TOMMY CAGE *v.* LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 89–7302. Decided November 13, 1990

PER CURIAM.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

In state criminal trials, the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S. 358, 364 (1970); see also *Jackson* v. *Virginia*, 443 U. S. 307, 315–316 (1979). This reasonable doubt standard "plays a vital role in the American scheme of criminal procedure." *Winship*, 397 U. S., at 363. Among other things, "[i]t is a prime instrument for reducing the risk of convictions resting on factual error." *Ibid.* The issue before us is whether the reasonable doubt instruction in this case complied with *Winship*.

Petitioner was convicted in a Louisiana trial court of first-degree murder, and was sentenced to death. He appealed to the Supreme Court of Louisiana, arguing, *inter alia*, that the reasonable doubt instruction used in the guilt phase of his trial was constitutionally defective. The instruction provided in relevant part:

> "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a rea-

> sonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*" *State* v. *Cage*, 554 So. 2d 39, 41 (La. 1989) (emphasis added).

The Supreme Court of Louisiana rejected petitioner's argument. The court first observed that the use of the phrases "grave certainty" and "moral certainty" in the instruction, "if taken out of context, might overstate the requisite degree of uncertainty and confuse the jury." *Ibid.* But "taking the charge as a whole," the court concluded that "reasonable persons of ordinary intelligence would understand the definition of 'reasonable doubt.'" *Ibid.* It is our view, however, that the instruction at issue was contrary to the "beyond a reasonable doubt" requirement articulated in *Winship.*

In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole. *Francis* v. *Franklin*, 471 U. S. 307, 316 (1985). The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to

"moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.*

Accordingly, the judgment of the Supreme Court of Louisiana is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

---

*Similar attempts to define reasonable doubt have been widely criticized by the Federal Courts of Appeals. See, *e. g.*, *Monk* v. *Zelaz*, 901 F. 2d 885, 889–890 (CA10 1990); *United States* v. *Moss*, 756 F. 2d 329, 333 (CA4 1985); *United States* v. *Indorato*, 628 F. 2d 711, 720–721 (CA1 1980); *United States* v. *Byrd*, 352 F. 2d 570, 575 (CA2 1965); see also *Taylor* v. *Kentucky*, 436 U. S. 478, 488 (1978).